(9) No. 01-1559-CFH Title: Joseph Massaro, Petitioner
v.
United States

Docketed: April 22, 2002 Court: United States Court of Appeals for the Second Circuit

Entry	Date	Proceedings and Orders
	Apr 15 2002	Petition for writ of certiorari filed. (Response due July 8, 2002)
	Apr 29 2002	Waiver of right of respondent United States to respond filed.
	Apr 30 2002	DISTRIBUTED for Conference of May 16, 2002
	May 8 2002	Response requested. (Due June 7, 2002)
	May 31 2002	Order extending time to file response to petition until July 8, 2002.
	Jul 8 2002	Brief of respondent United States in opposition filed.
	Jul 18 2002	Reply brief of petitioner Joseph Massaro filed.
	Jul 24 2002	REDISTRIBUTED for Conference of September 30, 2002
	Oct 1 2002	Petition GRANTED.
		SET FOR ARGUMENT February 25, 2003.
		**********
	Nov 14 2002	Joint appendix filed.
	Nov 14 2002	Brief of petitioner Joseph Massaro filed.
	Nov 14 2002	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
	Dec 18 2002	Brief of respondent United States filed.
	Jan 10 2003	CIRCULATED.
	Jan 13 2003	Record filed.
	Jan 22 2003	Reply brief of petitioner Joseph Massaro filed.
	Jan 23 2003	Record filed.
	Feb 25 2003	ARGUED.

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Supreme Court, U.S.
FILED

APR 15 2002

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No. 01-1559

In the

Supreme Court of the United States

JOSEPH MASSARO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

HERALD PRICE FAHRINGER
Counsel of Record
ERICA T. DUBNO
LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY
& CAMBRIA LLP
780 Third Avenue
New York, NY 10017
(212) 319-5351

Counsel for Petitioner

Of Counsel:
EUGENE GRESSMAN
Univ. of North Carolina
School of Law
Chapel Hill, NC 27599
(919) 962-3688

62 pp

QUESTION PRESENTED

Whether a federal criminal defendant, whose new appellate counsel fails to raise, on direct appeal, a claim of ineffective assistance of trial counsel, is procedurally barred from asserting that constitutional claim in a habeas corpus proceeding brought pursuant to 28 U.S.C. § 2255.[1]

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[1] The scale and urgency of this issue is amplified by the direct conflict between the Second Circuit and virtually all other Circuit courts that have considered this issue. The fact that the Solicitor General advocates that all ineffectiveness claims should be raised in § 2255 proceedings, rather than on direct appeal, lends enormous force to this Petition as well.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS AND ORDERS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	17
APPENDIX	

TABLE OF AUTHORITIES

Page(s)

Cases:

Billy-Eko v. United States,
509 U.S. 901 (1993) 9, 10

Billy-Eko v. United States,
8 F.3d 111 (2d Cir. 1993) 7, 10, 11

Chappell v. United States,
494 U.S. 1075 (1990) 9

Diaz-Albertini v. United States,
498 U.S. 1061 (1991) 9

Fisher v. United States,
328 U.S. 463 (1946) 15

Guinan v. United States,
6 F.3d 468 (7th Cir. 1993) 10, 16

Kimmelman v. Morrison,
477 U.S. 365 (1986) 13

Strickland v. Washington,
466 U.S. 668 (1984) 6, 14

United States v. Blaze,
143 F.3d 585 (10th Cir. 1998) 8

United States v. Cofske,
157 F.3d 1 (1st Cir. 1998), *cert. denied*,
526 U.S. 1059 (1999) 8

United States v. Cronic,
466 U.S. 648 (1984) 9

United States v. DeRewal,
10 F.3d 100 (3rd Cir. 1993), *cert. denied*,
511 U.S. 1033 (1994) 8, 15

United States v. Evans,
272 F.3d 1069 (8th Cir. 2001), *petition for cert. filed* (March 20, 2002) (No. 01-9266)..... 8

United States v. Galloway,
56 F.3d 1239 (10th Cir. 1995)..... 8, 10, 11, 12, 14, 15

United States v. Jake,
281 F.3d 123 (3rd Cir. 2002)..... 8

United States v. Massaro,
57 F.3d 1063 (2d Cir. 1995), *cert. denied*,
516 U.S. 933 (1995)..... 2, 6

United States v. Neuhausser,
241 F.3d 460 (6th Cir. 2001), *cert. denied*,
122 S. Ct. 181 (2001)..... 8

United States v. Pergler,
233 F.3d 1005 (7th Cir. 2000)..... 10

Sprecher v. United States,
516 U.S. 913 (1995)..... 12

Other Authorities:

28 U.S.C. § 1254(1)..... 2

28 U.S.C. § 2255 3

U.S. Const. amend. VI..... 3

David M. Rosenzweig, *Confession of Error in the Supreme Court by the Solicitor General*,
82 Georgetown Law Journal 2079 (July 1994)..... 9

Petitioner Joseph Massaro respectfully requests that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding. The opinion was filed on November 2, 2001.

OPINIONS BELOW

(1) The order of the Second Circuit, dated January 14, 2002, denying Petitioner's "Petition for Rehearing and Suggestion for Rehearing *En Banc*" is reprinted in the Appendix hereto, App. 1-2, *infra*.

(2) An unpublished "summary order" of the Second Circuit, dated November 2, 2001, affirmed a District Court order that denied Petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2255. That opinion is reprinted in the Appendix hereto, App. 3-10, *infra*.

(3) Petitioner had originally filed his § 2255 motion in April of 1997, together with a motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, in the District Court for the Southern District of New York. In an unpublished memorandum opinion and order dated May 11, 1998, District Judge Miriam Goldman Cedarbaum ruled that the § 2255 motion was timely, and the motion for a new trial was timely in part and untimely in part. That opinion is reprinted at App. 11-15, *infra*.

(4) Some three-and-a-half years after the Petitioner filed his § 2255 motion, on November 29, 2000, District Judge Cedarbaum, in an unreported opinion, denied both the motion for a new trial and the § 2255 application. That opinion is reprinted at App. 16-26, *infra*.

(5) On December 26, 2000, Judge Cedarbaum granted a certificate of appealability on the issue of whether Petitioner's claim of his ineffectiveness of trial counsel is procedurally barred from being raised in a § 2255 proceeding where new appellate counsel never argued, on direct appeal, that his

attorney was ineffective for not accepting a continuance after being confronted with a newly discovered bullet that the Government claimed connected Petitioner to the murder for which he was convicted. That certificate appears at App. 27, *infra*.

(6) On March 14, 2001, the Second Circuit expanded the certificate of appealability to include a second issue: "[W]hether the district court correctly found that appellant's claim that his trial counsel acted ineffectively when he refused to allow appellant to testify was procedurally barred based on appellant's failure to raise the claim on direct appeal." App. 28-29, *infra*.

(7) Still earlier, on May 18, 1995, the Second Circuit affirmed, in an unpublished opinion, Petitioner's conviction of murder and life sentence. *United States v. Massaro*, 57 F.3d 1063 (2d Cir. 1995) (Table). The Second Circuit's opinion is reproduced at App. 30-37, *infra*. Thereafter, on October 16, 1995, this Court denied certiorari. *Massaro v. United States*, 516 U.S. 933 (No. 95-461) (1995).

JURISDICTION

The opinion and judgment of the Second Circuit were filed on November 2, 2001. A Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied by the Second Circuit on January 14, 2002. The 90-day period for filing this petition for certiorari expires on Monday, April 15, 2002. See Rule 30.1. The jurisdiction of this Court to review the ruling of the Second Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

28 U.S.C. § 2255, known as a habeas corpus statute, provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in . . . or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> * * *
>
> An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

STATEMENT OF THE CASE

In 1992, Joseph Massaro, the Petitioner, was charged in ten counts of an 18-count indictment for racketeering and related RICO offenses. At the center of the indictment was a charge of murder in aid of a racketeering enterprise. On October 27, 1993, a federal jury convicted Petitioner of murder and all but one of the other RICO offenses. On July 26, 1994, Petitioner was sentenced to life imprisonment on the murder conviction, and is presently serving his sentence at the United States Penitentiary at Leavenworth, Kansas.[1] This petition deals solely with Petitioner's murder conviction, a murder that he has steadfastly denied committing.

In 1990, the dead body of Joseph Fiorito was found in the backseat of his car on the Long Island Expressway in Queens, New York. The police arrested Patrick Esposito, who, while removing his blood-soaked clothing, confided to his girlfriend that he had murdered Fiorito because of a dispute with him. Indeed, the record shows that Esposito's clothing was soaked in Fiorito's blood.

Esposito eventually plea bargained his way out of the murder charge on the condition that he testify that Petitioner, Joseph Massaro, shot and killed Fiorito in the car in which Fiorito's body was found. No bloody clothing was ever recovered from Petitioner; nor were any guns or bullets traceable to him. The police had thoroughly searched the backseat and floor carpeting of Fiorito's car but no bullets or bullet holes were found (Tr. 4184-92). Ultimately, the car was released by the police, and sold to a new owner. Thus,

[1] District Judge Cedarbaum sentenced Petitioner to life imprisonment on Counts One (RICO conspiracy), Two (substantive RICO violation), and Three (murder in aid of a racketeering enterprise). He was also sentenced to concurrent terms of imprisonment of 20 years and a fine of $240,000 on Counts Four, Five, Six, Seven, Eight, Nine and Ten. He was ordered to pay restitution of $104,100. Second Circuit Appendix at A.14.

there was absolutely no tangible or forensic evidence which, in any way, connected Petitioner to the murder.

Petitioner's trial commenced on September 7, 1993, three years after Fiorito's death. Opening statements had been made and the government's key witness, Esposito, had been on the witness stand for three days when the prosecutor suddenly, and without any prior warning, surprised the defense with a *bullet* which he later alleged incriminated Joseph Massaro. It seems that on the eve of trial, the new owner of Fiorito's car produced for the prosecutor a bullet he claimed to have just discovered in the car. This bullet was the only physical evidence that connected the Petitioner to the murder.

Recognizing the dilemma confronting defense counsel, the trial judge "repeatedly encouraged" him to accept an adjournment of the proceedings so that a proper investigation of this new and apparently inculpatory piece of evidence could be conducted.[2]

Despite these overtures, Massaro's counsel failed to accept any of these invitations to examine why and how a bullet could suddenly appear three years after the murder, and how such a piece of incriminating evidence could be discovered by the new owner of the car following thorough police searches of the car.

[2] During the oral argument of Petitioner's direct appeal from his conviction, the Second Circuit judges (Altimari, Jacobs, and Calabresi) were outraged that such a critical piece of evidence was withheld from Petitioner's counsel under these circumstances. Judge Calabresi declared that the prosecutors were holding back the bullet "in their vest pocket," and the court's opinion affirming the conviction declared that "the government should have advised the defense immediately of the bullet's discovery." Second Circuit Appendix at A.138 and App. 36, *infra*. The Second Circuit found, however, that the Government conduct "did not irreparably damage Massaro's strategy . . . Massaro has not claimed that he would have changed his cross-examination [of Esposito] had he been aware of the bullet." *Id*

Nevertheless, counsel went forward with the trial. What is worse, he accepted the Government's representations that the bullet was connected to the murder (Tr. 1994-95). He also agreed with the Government's ballistic expert's opinion that the bullet matched fragments taken from the victim's head (Tr. 3753-58), rather than conducting his own in-depth investigation. The trial continued without any pause and the bullet was received in evidence. Joseph Massaro was convicted of the murder and sentenced to life imprisonment.

On his direct appeal, new counsel claimed that the District Court erred in admitting the bullet in evidence. He also briefed the issue of the Government's delay in disclosing the bullet until well into the trial. The Second Circuit, nevertheless, affirmed the conviction.[3] App. 30-37, *infra*.

Later, after Massaro's appellate process was exhausted, new counsel, engaged to bring a habeas petition, uncovered after a proper investigation of the bullet that the physical evidence showed that the shooting in the car could *not have occurred* in the manner described by Esposito, and that it was highly unlikely that the bullet was connected with the shooting of Fiorito. Second Circuit Appendix at A.176, 184-85. As a consequence, Massaro, for the very first time, was able to assert a valid and cognizable ineffectiveness claim under the standards fixed in *Strickland v. Washington*, 466 U.S. 668 (1984). But, by then, Petitioner's direct appeal had been

[3] This Court denied certiorari on the direct appeal on October 16, 1995. *Massaro v. United States*, 516 U.S. 933 (No. 95-461). The two issues presented in that petition were (1) "whether there was sufficient effect on interstate commerce to warrant this criminal prosecution under the Hobbs Act, 18 U.S.C. § 1951," and (2) "whether the Government's failure to disclose the discovery of a crucial piece of evidence, to wit, a matching bullet, until after opening statements and cross-examination of a witness [Esposito] had begun violates a defendant's rights under the Due Process Clause?" No issue of ineffectiveness of counsel in failing to investigate the sudden appearance of the bullet was presented to this Court in that 1995 petition.

exhausted. Thus, Petitioner was forced to bring his ineffectiveness claim in the instant § 2255 proceeding.

The District Judge held that Petitioner was "procedurally barred" from raising the ineffectiveness since it had not been asserted on direct appeal. App. 24-25, *infra*.

The Second Circuit affirmed, relying on its controversial decision in *Billy-Eko v. United States*, 8 F.3d 111 (2d Cir. 1993). *Billy-Eko* holds that (1) where a defendant is represented by new counsel on direct appeal, and (2) when the claim that trial counsel was ineffective is based "solely on the record developed at trial," the defendant is procedurally barred from raising the issue in a subsequent § 2255 proceeding. The narrow exception to the *Billy-Eko* rule is where the defendant can establish cause for the failure to raise the issue on direct appeal *and* actual prejudice resulting from that failure. Since Petitioner's ineffective assistance claim was foreclosed by the *Billy-Eko* standard, and he did not establish any cause for his failure to raise the issue on direct appeal or any prejudice, the Second Circuit concluded that Petitioner procedurally forfeited his ineffectiveness claim. As a consequence, he was "procedurally barred" from raising it in the subsequent § 2255 proceeding. App. 6-8, *infra*.

Because of this procedural default, no court has ever addressed the merits of Joseph Massaro's claim that his trial counsel's failure to seek a continuance or adequately investigate the bullet denied him his constitutional right to the effective assistance of counsel guaranteed under the Sixth Amendment.

REASONS FOR GRANTING CERTIORARI

1. THE SECOND CIRCUIT'S RULING, IMPOSING A "PROCEDURAL BAR" FROM RAISING CERTAIN INEFFECTIVENESS OF COUNSEL CLAIMS IN A § 2255 PROCEEDING, CONFLICTS WITH RULINGS OF OTHER CIRCUITS AND THE POSITION CONSISTENTLY TAKEN BY THE SOLICITOR GENERAL

The Second Circuit's rule, holding that a defendant who has new counsel on direct appeal is *barred* from challenging his trial attorney's ineffectiveness in a § 2255 habeas proceeding, is in direct conflict with the rulings of virtually all other Circuit courts that have addressed this issue.[4] The Second Circuit's approach is also contrary to the position taken by the Solicitor General of the United States.

[4] Nearly every Circuit court has followed the rule that ineffectiveness claims should be brought in habeas petitions, rather than on direct appeal. *See, e.g., United States v. Cofske*, 157 F.3d 1, 2 (1st Cir. 1998), *cert denied*, 526 U.S. 1059 (1999); *United States v. Jake*, 281 F.3d 123, 132 n.7 (3rd Cir. 2002); *United States v. Neuhausser*, 241 F.3d 460, 474 (6th Cir. 2001), *cert. denied*, No. 00-10790, 122 S. Ct. 181 (2001); *United States v. Evans*, 272 F.3d 1069, 1093 (8th Cir. 2001), *petition for cert filed* (March 20, 2002) (No. 01-9266); *United States v. Blaze*, 143 F.3d 585, 593 (10th Cir. 1998).

Many Circuits also recognize that a defendant should not be barred from bringing an ineffectiveness claim in a § 2255 petition. *See United States v. Galloway*, 56 F.3d 1239, 1242 (10th Cir. 1995) (*en banc*) ("[n]o procedural bar will apply to claims which could have been brought on direct appeal but were brought in post-conviction proceedings instead"); *United States v. DeRewal*, 10 F.3d 100, 104 n.2 (3rd Cir. 1993) (a defendant is not required to show cause and prejudice for his failure to raise counsel's ineffectiveness on direct appeal), *cert. denied*, 511 U.S. 1033 (1994).

As noted in *United States v. Cronic*, 466 U.S. 648, 666, n.42 (1984):

> The Government argues that a defendant can attack the actual performance of trial counsel *only* through a petition for postconviction relief under 28 U.S.C. § 2255, and not through direct appeal, because ineffective assistance claims are generally not properly in the District Court nor preserved for review on appeal (emphasis added).

While this Court did not find it necessary in *Cronic* to address the merits of that proposed rule, the Solicitor General has adhered to its stand whenever this issue has come before the Court. In fact, the Solicitor General confessed error in *Billy-Eko v. United States*, 509 U.S. 901 (1993), "arguing that for reasons of uniformity and efficient judicial administration, the Government now supported a blanket rule that failure to raise claims of ineffective assistance of counsel on direct appeal *never* constitutes procedural default."[5] *See* Brief for the United States at 5-9 (No. 92-7897).

Based upon the logical and practical position asserted by the Solicitor General, this Court's response has been to grant certiorari, vacate the judgment below, and remand the case to the Circuit "for further consideration in light of the position asserted by the Solicitor in his brief for the United States." *See, e.g., Billy-Eko v. United States*, 509 U.S. 901 (1993); *Diaz-Albertini v. United States*, 498 U.S. 1061 (1991); *Chappell v. United States*, 494 U.S. 1075 (1990).

In spite of the overwhelming authority to the contrary, the Second Circuit remains attached to its extreme position even though this Court has encouraged it to reconsider its stance

[5] David M. Rosenzweig, *Confession of Error in the Supreme Court by the Solicitor General*, 82 Georgetown Law Journal 2079, 2104 (July 1994) (emphasis supplied).

because of the Solicitor General's compelling call for uniformity. *Billy-Eko v. United States*, 509 U.S. 901 (1993).[6]

It is worth noting that in *Guinan v. United States*, 6 F.3d 468 (7th Cir. 1993), the Seventh Circuit seemed to advocate an approach similar to that of the Second Circuit — finding a waiver of any ineffectiveness claim that could have been asserted by new counsel on direct appeal. However, in an incisive and thoughtful concurrence, Judge Frank H. Easterbrook denounced the majority's decision that directed district judges "to enforce a forfeiture rule that neither prosecutors nor prisoners want." 6 F.3d at 475-76 (Easterbrook, J., concurring).

Judge Easterbrook also indicated that only three Circuits (Second, Seventh and Tenth) had supported the forfeiture of ineffective assistance claims when not presented on direct appeal. 6 F.3d at 475 (Easterbrook, J., concurring). However, since then, the Tenth Circuit has altered its position and *expressly rejected* any waiver doctrine. *United States v. Galloway*, 56 F.3d 1239 (10th Cir. 1995). And, even the Seventh Circuit, although never expressly overruling its decision in *Guinan*, is "generally reluctant to hear ineffective assistance of counsel claims on direct appeal because most trial records, unsupplemented by a 28 U.S.C. § 2255 hearing, lack the evidence necessary to fashion a successful claim." *United States v. Pergler*, 233 F.3d 1005, 1009 (7th Cir. 2000).

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[6] On remand in *Billy-Eko*, the Second Circuit did not consider or follow the Solicitor General's position. Instead, it developed its own notion that the defendant would be precluded from raising ineffective counsel claims in § 2255 proceedings where new appellate counsel could have raised the claims on direct appeal because the ineffectiveness was developed on the trial record. *Billy-Eko v. United States*, 8 F.3d 111 (2d Cir. 1993). That is the novel ruling that the Second Circuit found controlling in this case.

Thus, we have identified three recognized approaches to this perennial issue:

(1) The Solicitor General suggests, for purposes of uniformity, that all ineffectiveness claims should be raised in a § 2255 habeas petition, rather than on direct appeal;

(2) the Tenth Circuit, *en banc*, holds that ineffectiveness claims should be brought in a § 2255 proceeding, but, for purposes of efficiency, claims which are fully developed in the record *may* be brought on direct appeal *or* under § 2255. However, no procedural bar will apply to claims which could have been brought on direct appeal but were brought in post-conviction proceedings instead. *Galloway*, 56 F.3d at 1242; and

(3) the Second Circuit adheres to the extreme position that ineffectiveness claims may *not* be brought in a § 2255 proceeding where the defendant has new counsel on direct appeal and the ineffectiveness is fully developed on the trial record. Under those circumstances, a defendant *must* bring the claim on direct appeal unless he can show cause for why the claim was not brought on appeal, and prejudice resulting therefrom. *Billy-Eko*, 8 F.3d at 114-15.

It is impossible to reconcile the Second Circuit's approach taken in the Petitioner's case with (1) nearly all the other Circuits; and (2) the position of the Solicitor General; and (3) the reasoning of the *en banc* decision of the Tenth Circuit, which expressly holds:

> The rule in this circuit, then, is that claims of constitutionally ineffective counsel should be brought on collateral review, in the first petition filed under 28 U.S.C. § 2255. Some rare claims which are fully developed in the record may be brought either on direct appeal or in collateral proceedings. No procedural bar will apply to claims which could have been brought on direct appeal but were brought in post-conviction

proceedings instead. *United States v. Galloway*, 56 F.3d at 1242.

This issue is of considerable importance to judges, prosecutors and defense attorneys throughout the country who have been calling for resolution of this critical issue.[7] Now is the time for this Court to resolve this disruptive conflict of authority. The basic unfairness of the Second Circuit's procedural trap to litigating ineffectiveness claims in § 2255 proceedings adds to the appropriateness of granting certiorari in this case.

[7] Significantly, in 1995, a petition for certiorari was filed by a petitioner from the Second Circuit raising the question of "Whether the courts below correctly resolved petitioner's allegations of ineffective assistance of counsel, first raised in a post-conviction motion under 28 U.S.C. § 2255." *Sprecher v. United States*, No. 95-82, *cert. denied*, 516 U.S. 913 (1995). The Solicitor General's brief in opposition stated that "whatever tension exists between the rule generally followed by all the courts and the narrow limitation on that rule established by the Second Circuit is not present in the instant case." The Solicitor General emphasized that there "the district court actually considered each aspect of petitioner's ineffectiveness claim, so the different rule followed by the Second Circuit in certain circumstances actually made no difference in petitioner's case." Solicitor General's Br. at 9. The Solicitor General concluded that "whatever limitation the Second Circuit places on the general rule for presenting claims of ineffective assistance of counsel has had no effect on the outcome of this case." *Id.* at 10-11. In contrast, here neither the district court nor the Second Circuit ever addressed the merits of Joseph Massaro's claim that he was denied the effective assistance of counsel where his attorney failed to accept the court's offer of a continuance of the trial to adequately investigate the issues presented by the Government's belated disclosure of the bullet.

2. CERTIORARI SHOULD BE GRANTED TO DETERMINE THE RECURRING AND IMPORTANT QUESTION OF WHEN INEFFECTIVENESS OF COUNSEL CLAIMS SHOULD BE RAISED

Because of the mass of case law that has developed relating to a defendant's right to the effective assistance of counsel, which continues to be an issue of great concern in all federal courts, it is evident that this Court should give some definitive guidance as to an appellate attorney's obligations relating to such claims.

This Court has recognized that "[b]ecause collateral review will frequently be the only means through which an accused can effectuate the right to counsel, restricting the litigation of some Sixth Amendment claims to trial and direct review would seriously interfere with an accused's right to effective representation." *Kimmelman v. Morrison*, 477 U.S. 365, 378 (1986).

The Second Circuit's exceptional stance requires new counsel to raise on direct appeal any ineffectiveness of the trial attorney that conceivably may have been developed at trial. However, this ignores the reality that the trial attorney may well be advising and cooperating with the new appellate counsel, which inevitably impairs the raising of such a claim.

Moreover, questions concerning whether counsel's ineffectiveness is fully and adequately developed on the trial record can be immensely complicated. For example, was a full evidentiary hearing conducted on the record as to the specific issue or was, as in Joseph Massaro's case, it merely mentioned a few times during the course of the trial? Did counsel have a thorough opportunity to explain his conduct? As recognized by the Tenth Circuit, sitting *en banc*, "at the very least counsel accused of deficient performance can explain their reasoning and actions, and the district court

can render its opinion on the *merits* of the claim." *Galloway*, 56 F.3d at 1240 (emphasis supplied).

And, even if the facts giving rise to counsel's ineffectiveness may be fully spelled out on the trial record, the *prejudice* to the defendant through counsel's deficient performance, required under *Strickland v. Washington*, 466 U.S. 668 (1984), may not be apparent on direct appeal. For example, on Joseph Massaro's direct appeal, counsel had no basis to assert the trial lawyer's failure to obtain an adjournment as an issue because, based on the record, the bullet was linked to the murder. It was only after that a proper investigation uncovered the *prejudice* of counsel's failures in assuming that the bullet matched the fragments in Fiorito's head, and refusing the court's offer of a continuance to conduct a proper investigation.

In addition, under the Second Circuit's approach, appellate counsel, who is actually bound by the trial record, must himself undertake investigations to find prejudice, required under *Strickland*, which will require exploration outside the boundaries of the trial. Such a requirement places an unreasonable, as well as an unbearable, burden upon appellate counsel. And, if he does not do so, he may face an ineffectiveness claim *himself*, either for not conducting the investigation or not raising the claim. Thus, in practical application, the *Billy-Eko* exception represents a marked departure from the more reasonable rule adopted by the other Circuit courts and advocated by the Solicitor General. As a consequence, judged from the infallible distance of time, *Billy-Eko* is unworkable and continues to generate confusion.

As indicated earlier, recognizing the severity of waiver, the Second Circuit created a narrow exception to the *Billy-Eko* doctrine of procedural forfeiture whereby the failure of new appellate counsel to raise a fully developed ineffectiveness claim on direct appeal can be excused "only if the

defendant can demonstrate cause for the failure to raise the issue and actual prejudice resulted therefrom." App. 7, *infra*.

However, the "cause and prejudice" exception is unwieldy and unworkable. As observed by the Tenth Circuit,

> if procedural bar is raised as a defense, it embroils us in nonmerits issues which are as time consuming as if we went straight to the merits, and infinitely less productive. Applying, as we must, the cause and prejudice standard for avoiding the procedural default, we must first examine all the reasons advanced as cause, and write on the subtext after revisiting everything that happened on direct appeal, and then some. In conjunction, or as an alternative, we must examine prejudice, which is nothing less than evaluating the merits to determine whether we should evaluate the merits. Nothing productive is accomplished. *Galloway*, 56 F.3d at 1242.

The Third Circuit also concluded that the burdensome "cause and prejudice" standard does not apply to an ineffective assistance of counsel claim asserted in a § 2255 petition. *United States v. DeRewal*, 10 F.3d 100, 101 (3rd Cir. 1993) (the requirement would lead to unnecessary confusion and a proliferation of litigation regarding alleged procedural defaults), *cert. denied*, 511 U.S. 1033 (1994).

More than 50 years ago, Justice Felix Frankfurter eloquently wrote that "[l]aw triumphs over natural impulses aroused by such a [shocking] crime only if guilt be ascertained by due regard for those indispensable safeguards which our civilization has evolved for the ascertainment of guilt." *Fisher v. United States*, 328 U.S. 463, 477 (1946) (Frankfurter, J., dissenting). Here, those indispensable safeguards were denied to Joseph Massaro because of counsel's ineffectiveness taken in combination with the prosecutor's

action in withholding the bullet in his "vest pocket" until after the trial commenced.

But, the true injustice is the failure of the District Court and Second Circuit to address the merits of Joseph Massaro's ineffectiveness claim. The court never heard any explanation from trial counsel as to why he declined the judge's repeated offers of a continuance, and why he failed to conduct proper investigations in this murder trial. Under the mantle of *Billy-Eko*, defendants, like Joseph Massaro, will be deprived of *any* safeguards where certain ineffectiveness claims are presented on collateral attack, rather than on direct appeal.

Prisoners who have been mistakenly convicted, because of constitutional errors, suffer a grievous wrong and should be entitled to a hearing into the substance of their claims. This is especially true where a defendant has received such a severe sentence. The absence of full adversary testing of these constitutional claims, which is available in § 2255 proceedings rather than on direct appeal, cannot help but erode our confidence in the criminal justice system and degrades the right to the effective assistance of counsel. And, lawyers "who raise ineffective-assistance claims on direct appeal do their clients a grave disservice, because the inevitable loss will prevent the accused from raising the same claim later, when factual development would permit accurate resolution." *Guinan*, 6 F.3d at 476 (Easterbrook, J., concurring).

CONCLUSION

Joseph Massaro has been condemned to prison for the rest of his life and denied the opportunity to argue the ineffectiveness of his counsel because the Second Circuit concluded that his constitutional claim was procedurally barred by its harsh *Billy-Eko* exception to the general rule that ineffectiveness claims should always be raised on collateral attack. For all the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the Second Circuit's opinion in this case.

Respectfully submitted.

HERALD PRICE FAHRINGER
Counsel of Record
ERICA T. DUBNO
LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY
& CAMBRIA LLP
780 Third Avenue
New York, NY 10017
(212) 319-5351

Counsel for Petitioner

Of Counsel
EUGENE GRESSMAN
Univ. of North Carolina
School of Law
Chapel Hill, NC 27599
(919) 962-3688

APPENDIX

TABLE OF CONTENTS

	Page
Order of the United States Court of Appeals for the Second Circuit, Dated January 14, 2002, Denying Petitioner's "Petition for Rehearing and Suggestion for Rehearing *En Banc*"	A-1
"Summary Order" of the United States Court of Appeals for the Second Circuit, Dated November 2, 2001, Affirming a District Court Order that Denied Petitioner's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2255	A-3
Memorandum Opinion and Order of the United States District Court for the Southern District of New York, Dated May 11, 1998, of Judge Miriam Goldman Cedarbaum, Ruling that the 28 U.S.C. § 2255 Motion was Timely, and the Motion for a New Trial was Timely in Part and Untimely in Part	A-11
Opinion of the United States District Court for the Southern District of New York, Dated November 29, 2000, of Judge Miriam Goldman Cedarbaum, Denying Both the Motion for a New Trial and the 28 U.S.C. § 2255 Application	A-16
Order of United States District Court for the Southern District of New York, Dated December 26, 2000, of Judge Miriam Goldman Cedarbaum, Granting a Certificate of Appealability	A-27
Order of the United States Court of Appeals for the Second Circuit, Dated March 14, 2001, Enlarging the Certificate of Appealability	A-28

Order of the United States Court of Appeals
for the Second Circuit, Dated May 18, 1995,
Affirming Petitioner's Conviction of Murder
and Life Sentence A-30

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the fourteenth day of January two thousand two.

UNITED STATES COURT OF APPEALS
FILED JAN 14 2002
Roseann B. MacKechnie, Clerk
SECOND CIRCUIT

JOSEPH MASSARO,

Petitioner-Appellant,

V. Docket No.: 00-2720

UNITED STATES OF AMERICA,

Respondent-Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Joseph Massaro.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active

service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE. Clerk

By: /s/ Art Heller
Art Heller.
Administrative Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT. BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE. IN A RELATED CASE. OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit. held at the United States Courthouse. Foley Square. in the City of New York. on the 2nd day of November two thousand and one.

PRESENT:

HON. CHESTER J. STRAUB.
HON. ROBERT A. KATZMANN.
HON. FRANK J. MAGILL*
Circuit Judges.

JOSEPH MASSARO.

Petitioner-Appellant.

No. 00-2720

SUMMARY ORDER

–v–

UNITED STATES OF AMERICA.

Respondent-Appellee

* The Honorable Frank J. Magill. of the United States Court of Appeals for the Eighth Circuit. sitting by designation.

Appearing for Petitioner-Appellant:

David N. Kelly, Assistant United States Attorney for the Southern District of New York (Mary Jo White, United States Attorney, and Celeste L. Koeleveld, Assistant United States Attorney, on the brief) New York, NY.

Appearing for Respondent-Appellee:

Herald Price Fahringer of Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, LLP (Erica T. Dubno on the brief) New York, NY.

Appeal from the United States District Court for the Southern District of New York (Miriam Goldman Cedarbaum, *Judge*.)

AFTER ARGUMENT AND UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby AFFIRMED.

Petitioner-Appellant Joseph Massaro appeals from an order entered in the United States District Court for the Southern District of New York (Miriam Goldman Cedarbaum, *Judge*) denying his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2255. On appeal, Massaro contends that the District Court incorrectly determined that his claims of ineffective assistance of counsel were procedurally barred. For the foregoing reasons, we reject Massaro's claims and deny his petition for a writ of habeas corpus.

FACTUAL AND PROCEDURAL BACKGROUND

On October 27, 1993 a jury found Massaro guilty of numerous racketeering crimes, including murder, extortion, arson, and loansharking. Massaro, a member of the Luchese Organized Crime Family, ran an organization called the Entertainment Plus Agency that booked topless dancers for clubs on

Long Island. In the late 1980's, Massaro sought to expand his control over Long Island's topless bar industry and engaged in a campaign of intimidation against club owners who would not utilize his services. In 1989, Massaro discovered that one of his associates, Joseph Fiorito, was stealing from him. Together with another associate, Massaro lured Fiorito to an empty house where Massaro shot Fiorito once in the head. When transporting the body in an automobile Massaro discovered that Fiorito was not dead, and therefore shot him again in the head. On September 21, 1989, New York City police discovered Fiorito's body, still in the car where he had been shot for the second time. Although the police found a spent shell casing in the car, they did not initially find a bullet or blood in the front seat. The car was released from state custody without being thoroughly searched. Massaro was arrested in 1992 after an associate, Patrick Esposito, who was cooperating with police provided information implicating Massaro.

Trial commenced on September 7, 1993. Several days before trial, the new owner of the car in which Fiorito's body was found discovered a hole in a floorboard and a bullet. On September 6, 1993, the government was advised of the discovery but did not inform Massaro's counsel until September 11th. In the meantime, Massaro's counsel had delivered an opening statement arguing that Esposito alone murdered Fiorito and that no physical evidence linked Massaro to the crime. On September 23, 1993 the prosecution for the first time raised the issue of the bullet with the court. At that time, Massaro neither sought to preclude the bullet nor requested a continuance pending forensic results. On September 27, 1993, the prosecution advised Massaro that the bullet matched fragments recovered from Fiorito's body and had been fired by the same gun. Massaro then moved to preclude admission of the bullet due to the late discovery. The court rejected the motion but offered a continuance so that Massaro's counsel

could examine the evidence and adjust his legal strategy. Massaro's counsel declined the continuance.

Massaro was convicted on all counts and sentenced to life imprisonment, a $240,000 fine, and restitution. On direct appeal, we affirmed Massaro's conviction in an unpublished order, *United States v. Massaro*, 57 F.3d 1063 (2d Cir. 1995) (unpublished order), and the Supreme Court denied certiorari, *see Massaro v. United States*, 516 U.S. 933 (1995). Massaro then filed a petition for habeas corpus pursuant to 28 U.S.C. § 2255 alleging several grounds upon which he should be granted a new trial. The District Court rejected all of Massaro's arguments. In addition to rejecting most arguments on the merits, the court found that several of his claims were procedurally barred because they were not raised on direct appeal. The District Court, however, granted Massaro a certificate of appealability on the issue of whether it correctly determined that Massaro's claim that his counsel acted ineffectively when he refused a continuance was procedurally barred. On March 14, 2001, we expanded the certificate of appealability to include a second issue, namely, "whether the district court correctly found that appellant's claim that his trial counsel acted ineffectively when he refused to allow appellant to testify was procedurally barred based on appellant's failure to raise the claim on direct appeal."

DISCUSSION

Massaro's first argument is that he was denied a fair trial when his trial counsel failed to accept a continuance after the government sought to introduce the bullet into evidence. The District Court found that this claim was procedurally barred because Massaro's appellate counsel failed to raise it on direct appeal. As a general matter, a federal prisoner cannot employ § 2255 to litigate issues that could have been, but were not, raised on direct appeal. *Douglas v. United States*, 13 F.3d 43, 46 (2d Cir. 1993). Failure to raise a claim on direct appeal ordinarily results in procedural default precluding appellate

review of the issue. *United States v. Helmsley*, 985 F.2d 1202, 1205 (2d Cir. 1992). In *Billy-Eko v. United States*, 8 F.3d 111 (2d Cir. 1993), we created a limited exception to this general rule for ineffective assistance claims. Because when one attorney serves as both trial and appellate counsel it is unlikely that an attorney would raise an ineffective assistance claim against himself, such claims will not ordinarily be procedurally barred even if not raised on direct appeal. *Billy-Eko*, however, made clear that when (1) the defendant was represented by new counsel on direct appeal, and (2) when the ineffective assistance claim was based "solely on the record developed at trial," the normal rules of exhaustion will still apply. 8 F.3d at 113–14. When these two conditions are met, the failure to raise ineffective assistance claims on direct appeal will be excused only if the defendant can demonstrate cause for the failure to raise the issue and actual prejudice resulting therefrom. *See id.*

In the instant case, it is undisputed that Massaro was represented by different counsel during direct appeal of his conviction. It is also clear that the basis for Massaro's claim of ineffective assistance of counsel for failure to accept a continuance is based solely on the record adduced at trial and available to Massaro's appellate counsel on direct appeal. At trial, Massaro's counsel engaged in many discussions about the decision not to accept a continuance. For example, on September 28th, Massaro's trial counsel explained to the court that a continuance was unnecessary because a ballistics expert had already been retained and an examination of the bullet could be accomplished quickly. And in fact, Massaro's forensic expert in short order concurred with the assessment of the government experts in that the bullet matched the fragments in Fiorito's head. The fact that a new set of experts allegedly reached different conclusions after trial does not render the basis for Massaro's ineffective assistance claim outside the scope of the record adduced at trial. Moreover, each of the issues raised by Massaro's most recent forensic analysis —

the absence of blood in the vehicle, the absence of blood "spatter" or other remnants, the belated discovery of the bullet after several searches — all were extensively addressed at trial. In short, the record available to Massaro's appellate counsel fully revealed the implications of the failure to accept a continuance. Therefore, Massaro's counsel should have raised the claim on direct appeal; the failure to do so means that the claim is procedurally defaulted.

When a claim is defaulted, collateral review of the claim is available only if the petitioner is able to demonstrate cause for the default and prejudice resulting therefrom. *See, e.g., Bousley v. United States*, 523 U.S. 614, 622-24 (1998). This Massaro is unable to do. In order to demonstrate cause, a petitioner must be able to show that the factual basis for a claim was not reasonably available, despite the exercise of reasonable diligence. *See Helmsley*, 985 F.2d at 1205–08. As discussed immediately above, the basis for Massaro's claim was fully available to his appellate counsel. Thus, Massaro would be unable to establish cause necessary to overcome a procedural default.

Massaro's other claim is that the District Court erred in concluding that Massaro's ineffective assistance of counsel claim based on counsel's alleged refusal to allow Massaro to testify was procedurally barred. Here, the government agrees with Massaro that the District Court erred in dismissing this aspect of Massaro's § 2255 petition as procedurally barred. The government does so in light of *Chang v. United States*, 250 F.3d 79, 84 (2d Cir. 2001), where we held that a petitioner's ineffective assistance claim based on counsel's refusal to allow the petitioner to testify was not procedurally barred by failure to raise the claim on direct appeal. *Chang*, however, is easily distinguishable from the instant situation. In *Chang* we explicitly noted that the petitioner's claim "involve[d] off-the-record interactions with his trial counsel and therefore cannot be determined by examining the motion, files, and

records before the district court." Because the claim in *Chang* was not based solely on the trial record, the claim fell within *Billy-Eko* and thus was not procedurally barred. The other cases cited by Massaro similarly involve allegations of improper conduct or other circumstances outside the bounds of the trial court record. *See Amiel v. United States*, 209 F.3d 195, 198 (2d Cir. 2000) ("Appellant was represented by new counsel on direct appeal, but her claim is based on events outside the trial record, namely, counsel's alleged off-the-record statements and alleged disloyal reasons for failing to pursue a reasonable trial strategy."); *Armiem v. United States*, 234 F.3d 820, 825 (2d Cir. 2000) ("These issues implicate actions taken by counsel outside the presence of the trial judge and therefore could ordinarily be resolved by him without such a hearing."). Here, Massaro has alleged no facts or circumstances surrounding his trial counsel's decision to disallow Massaro from testifying. Instead, Massaro's claim is based only on the conclusory statement that "[h]ad Mr. Massaro been allowed to [testify], there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." Under such circumstances, Massaro has not alleged any facts that are outside the record developed at trial. Because Massaro was represented by different counsel on appeal, and because the facts and circumstances surrounding his second ineffective assistance claim are based on the record developed at trial, the claim is procedurally defaulted. *See Billy-Eko*, 8 F.3d at 113–14. And as with his first ineffective assistance of counsel claim, Massaro is unable to satisfy the cause and prejudice test necessary to overcome a procedural default. *See Bousley*, 523 U.S. at 622–24.

Accordingly, the judgment of the District Court is AFFIRMED.

FOR THE COURT

Roseann B. MacKechnie. Clerk

By: /s/ Oliva M. George

Oliva M. George. Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPH MASSARO.

Petitioner.

-against-

UNITED STATES
OF AMERICA.

Respondent.

S1 92 Cr. 529 (MGC)
97 Civ. 2971 (MGC)

MEMORANDUM OPINION
AND ORDER

CEDARBAUM, J.

Joseph Massaro, a person in custody under a sentence of this Court, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2255 and a new trial pursuant to Federal Rule of Criminal Procedure 33. At my direction, the parties have submitted memoranda of law on the timeliness of these applications. For the reasons discussed below, the § 2255 petition is timely, and the motion for a new trial is timely in part and untimely in part.

1. Petition for a Writ of Habeas Corpus

The Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA"), effective April 24, 1996, amended 28 U.S.C. § 2255 to add the following time limitation:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —
>
> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if

the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255.

On October 27, 1993, a jury found Massaro guilty of numerous racketeering crimes, including murder, extortion, arson and loansharking. Massaro was sentenced on July 26, 1994. The Second Circuit affirmed petitioner's judgment of conviction on May 18, 1995, and issued its mandate on June 9, 1995. On October 16, 1995, the United States Supreme Court denied petitioner's petition for a writ of certiorari. On April 24, 1997, the Office of the Clerk of the Southern District of New York received Massaro's § 2255 petition.

In analyzing the period of limitations applicable under 28 U.S.C. § 2244(d)(2), the Court of Appeals has held that if a petitioner applying for relief under 28 U.S.C. § 2254 has had several years to contemplate bringing a federal habeas corpus petition, it is not necessary to accord him a full year after the effective date of the AEDPA before applying the one-year statute of limitations. *Peterson v. Demskie*, 107 F.3d 92, 93 (2d Cir. 1997); *see also Scott v. U.S.*, 1998 WL 2828, at *1 (S.D.N.Y. Jan. 6, 1998) (applying *Peterson* to petition brought pursuant to 28 U.S.C. § 2255); *Santana v. U.S.*, 982 F.Supp. 942, 944-945 (S.D.N.Y. 1997) (same).

The petition for a writ of habeas corpus was filed only 18 months after the judgment of conviction became final, and exactly one year after the effective date of the AEDPA. Thus,

the petition was filed within a reasonable period of time after the effective date of the AEDPA.

2. Motion for a New Trial

Federal Rule of Criminal Procedure 33 states that the court "on motion of the defendant may grant a new trial to that defendant if required in the interest of justice." Rule 33 further provides that "[a] motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment" and that "[a] motion for a new trial based on any other grounds shall be made within 7 days after verdict." These time limits are jurisdictional. If a Rule 33 motion is not timely filed, the district court lacks power to consider it. *United States v. Dukes*, 727 F.2d 34, 38 (2d Cir. 1984).

The motion for a new trial was filed on May 14, 1997, several years after Massaro's October 27, 1993 guilty verdict. To the extent that the motion is not based on newly discovered evidence, it is untimely under Rule 33, since it was filed more than seven days after the verdict. However, a motion based on newly discovered evidence may be brought within two years of "final judgment." Thus, the government concedes that if the motion for a new trial is based on newly discovered evidence, it is timely. *See* Letter from Assistant United States Attorneys David N. Kelly and Lisa P. Korologos of December 12, 1997, at 7 n. 10; *United States v. Reyes*, 49 F.3d 63, 68 (2d Cir. 1995) (time limitation for Rule 33 motion based on newly discovered evidence runs from issuance of mandate of Court of Appeals).

The motion for a new trial is based on several pieces of evidence, only some of which can be considered "newly discovered" within the meaning of Rule 33. First, on the day before opening statements in Massaro's trial, the New York Police Department found a bullet in Joseph Fiorito's car, where Fiorito's body had been discovered three years earlier.

Massaro's trial counsel was offered a continuance in order to perform tests on the bullet, but he refused this opportunity and instead argued, unsuccessfully, for a mistrial or for preclusion of the bullet. Since the trial, Massaro's new counsel has had the bullet subjected to expert tests that purportedly show that the bullet was "planted" to corroborate the prosecution's case. Massaro apparently contends that these post-trial tests constitute "newly discovered evidence" within the meaning of Rule 33. The bullet was revealed before the close of the trial, however, and Massaro was offered a continuance in order to have tests performed on this evidence. Having learned of the bullet during trial, and having declined the opportunity to test the bullet during trial, Massaro cannot now contend that the post-trial tests conducted by his newly-retained experts qualify as newly discovered evidence permitting him to move for a new trial at this late date. Thus, to the extent that the motion for a new trial is based on evidence relating to the bullet found in Joseph Fiorito's car, it is untimely.

Second, Massaro claims more generally that new expert tests on the government's forensic evidence, conducted after the trial, cast doubt on the reliability of the government's evidence. There is no claim, however, that these tests are based upon evidence that was not available during trial. Rather, the only thing that is "new" about this evidence is the team of experts reviewing it. Such evidence is not "newly discovered" within the meaning of Rule 33. To the extent that the motion for a new trial is based on this evidence, it is untimely.

Third, Massaro claims that he recently has discovered that the government failed to turn over evidence showing that an important prosecution witness, Alfonse D'Arco, lied under oath about his involvement in drug trafficking. Massaro further claims that more than two years after Massaro's conviction, he learned of the existence of a psychological evaluation of D'Arco. According to Massaro, the government denied the existence of such an evaluation when it was requested by trial

counsel. This material is "newly discovered evidence" under Rule 33, and the motion for a new trial is not untimely to the extent that it is based upon this evidence.

Fourth, Massaro claims that before and during trial, the government failed to disclose purportedly exculpatory statements by Mark Carney, owner of a business that Massaro was alleged to have extorted. Massaro claims that this evidence was disclosed for the first time after trial, in the Presentence Investigation Report prepared by the Probation Department. The source of this evidence is unclear at this time, and it is not apparent whether this material is "newly discovered evidence" under Rule 33. Accordingly, to the extent that it is based on the purportedly exculpatory statements by Mark Carney referred to in the Presentence Investigation Report, it is not clear at this time whether the motion is untimely.

CONCLUSION

For the foregoing reasons, the motion for a new trial is dismissed as untimely except to the extent that it is based on the evidence related to Alfonse D'Arco and on the purportedly exculpatory statements made by Mark Carney. The respondent shall file a response to the petition for a writ of habeas corpus and to the motion for a new trial by July 13, 1998.

SO ORDERED.

Dated: New York, New York
May 11, 1998

/s/ Miriam Goldman Cedarbaum

MIRIAM GOLDMAN CEDARBAUM
United States Senior District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPH MASSARO.

Petitioner.

-against-

97 Civ. 2971 (MGC)

UNITED STATES OF AMERICA.

Respondent.

UNITED STATES OF AMERICA.

-against-

S1 92 Cr. 529 (MGC)

JOSEPH MASSARO.

Defendant.

OPINION

APPEARANCES.

LIPSITZ, GREEN, FAHRINGER, ROLL, SALISBURY & CAMBRIA
Attorneys for Petitioner
110 East 59th Street
New York, NY 10022
BY: Herald Price Fahringer
Erica T. Dubno

JAMES R. FROCCARO, JR.
Attorney for Petitioner
7 Old Shore Road
Port Washington, NY 11050

MARY JO WHITE
United States Attorney
Southern District of New York
Attorney for Respondent
One Saint Andrew's Plaza
New York, NY 10007
BY: David N. Kelley
Lisa P. Korologos
Assistant United States Attorneys

Cedarbaum, J.

Joseph Massaro, a person in custody under a sentence of this Court, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2255 and a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. The grounds for Massaro's § 2255 petition include the following: (1) the government violated his constitutional right to due process when it presented false and misleading evidence concerning a bullet that was discovered on the eve of trial; (2) the government withheld material exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1993); (3) the Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624 (1995), changed the law regarding the required nexus to interstate commerce under the Hobbs Act, 18 U.S.C. § 1951; and (4) petitioner was denied effective assistance of trial counsel in violation of the Sixth Amendment.

The grounds for Massaro's Rule 33 motion essentially mirror some of his grounds for § 2255 relief. Massaro repeats his contentions regarding the bullet evidence and undisclosed *Brady* material, and claims that these constitute "newly discovered" evidence. In an earlier opinion on the Rule 33 motion, I held that Massaro's contentions regarding the bullet do not constitute "newly discovered" evidence within the meaning of Rule 33. *Massaro v. United States*, 1998 WL 241625 (S.D. N.Y. May 12, 1998). For the reasons discussed below, Mas-

saro's petition under § 2255 and the balance of his Rule 33 motion are denied.

I. Background

On October 27, 1993, a jury found Massaro, a soldier in the Luchese Organized Crime Family, guilty of numerous racketeering crimes, including murder, extortion, arson and loansharking, in his efforts to take over Long Island's topless bar industry. Massaro was sentenced on July 26, 1994 to life imprisonment and a $240,000 fine, as well as payment of restitution. In November 1994, Massaro, represented by new counsel, appealed his conviction, listing eight grounds of error. The Second Circuit issued an unpublished opinion affirming Massaro's conviction on May 18, 1995. On October 16, 1995, the United Supreme Court denied Massaro's petition for a writ of certiorari.

II. Discussion

A) *Claims that have been argued on direct appeal*

It is a well-settled rule that "Section 2255 may not be employed to relitigate questions which were raised and considered on direct appeal." *Riascos-Prado v. United States*, 66 F.3d 30, 33 (2d Cir. 1995). Accordingly, Massaro's claims relating to the bullet evidence, as well as his claims concerning the requisite nexus to interstate commerce under the Hobbs Act, cannot be raised in a § 2255 petition. The only exception to this rule arises when the issue was not raised because of ineffective assistance of counsel, or when there has been an intervening change of law. *Underwood v. United States*, 15 F.3d 16, 18 (2d Cir. 1993). Neither of these exceptions applies to these claims.

1) Bullet Evidence

According to the evidence at trial, by the end of the summer of 1989, Massaro, believing that Joseph Fiorito, an associate in his crew, had been stealing from him, decided to kill

Fiorito. Together with Esposito, Massaro lured Fiorito to an empty home in Hauppauge. After shooting Fiorito in the head once in the basement of the house, Massaro, with Esposito's help, carried Fiorito through the house and placed the body in a sitting position on the rear seat of the car that had been driven by Fiorito. As they crossed New York City, Massaro expressed concern that Fiorito might not be dead, and again shot Fiorito in the head.

On September 21, 1990, Fiorito's body was discovered in the back seat of a car. The New York City Police Department's Crime Scene Unit examined the vehicle at the scene and found a shell casing on the floor of the rear passenger compartment. No additional ballistics evidence was recovered. At the time, the police were aware of only one wound — an entry wound — to Fiorito's head. The medical examiner subsequently established that Fiorito had been shot twice, and that there were two entry wounds and one exit wound on his head. After state criminal charges against Esposito were dismissed as a result of his cooperation with the government, the car used to transport Fiorito's body was released from state custody. Several days before trial commenced, police sergeant Carbone tracked down Fiorito's car, but was unsuccessful in searching for the second bullet. However, the car's new owner discovered a hole in the floorboard and a bullet, and on September 6, 1993, the day before opening statements, advised the government of the discovery.

The government waited until Saturday, September 11, 1993, to advise Massaro's lawyer, by faxed letter, of the existence of the bullet, and offered to make available a videotape reenactment of its discovery. When the trial resumed on Monday, Massaro's counsel did not mention the bullet. On Thursday, September 23, 1993, Massaro's counsel finally raised the issue with the Court and sought to expedite ballistics tests that were being conducted by the government. On Monday, September 27, 1993, the government advised Massaro that its

expert had concluded that the bullet matched the fragments recovered from Fiorito's body, and had probably been fired from the same gun. Massaro moved for a mistrial, or, in the alternative, to preclude admission of the bullet because of its late disclosure. The motion for a mistrial was denied and the bullet evidence was ruled admissible because the defense's position had not been irretrievably prejudiced by the government's delay. Nevertheless, Massaro was offered a continuance to allow him time to examine the evidence and make any necessary adjustments to his trial strategy. Moreover, Massaro was permitted to reexamine any witnesses in light of the newly discovered evidence. Massaro reexamined one investigator, but declined the continuance.

In an unpublished opinion, the Second Circuit described the government's delay as "regrettable," but concluded that it was not error to admit the evidence. 92 Cri. 529, Slip Op., 94-1447, at 5 (2d Cir. May 18, 1995). The Second Circuit stated that the late disclosure and the government's presentation of the bullet evidence had not "irreparably damaged Massaro's strategy" and "Massaro's failure to avail himself of the offer of a continuance calls into doubt the claim of error." *Id*

In his § 2255 petition, Massaro offers the affidavits of three forensic experts who question the government's conclusion that the discovered bullet came from the same gun as the bullet found in Fiorito's head. Massaro argues that his "new" experts demonstrate that the government presented "false and misleading" evidence in violation of Massaro's rights under the Fifth Amendment. However, Massaro's current argument simply repeats the argument that he has already unsuccessfully pursued in the Court of Appeals: the only difference is that Massaro has now added "new" experts to support his claim. But, these "new" experts are not newly discovered evidence. I have previously dismissed the bullet issue from the Rule 33 motion for precisely that reason: "There is no claim,

however, that these tests, are based upon evidence that was not available during trial. Rather, the only thing that is "new" about this evidence is the team of experts reviewing it. Such evidence is not "newly discovered" within the meaning of Rule 33." *Massaro v. United States*, 1998 WL 241625, at *5. Moreover, Massaro's claim of unfair prejudice has been rejected by the Court of Appeals.

2) Nexus to Interstate Commerce

Massaro's contention regarding the necessary nexus to interstate commerce under the Hobbs Act is also barred.[1] One of Massaro's eight grounds for appeal was that the government had presented insufficient evidence to demonstrate a link to interstate commerce. In his § 2255 petition, Massaro attempts to raise this argument once again by claiming that the government failed to satisfy its burden of proving a sufficient nexus to interstate commerce, and that the jury charge regarding the requisite jurisdictional element was erroneous. Recognizing that he had raised this ground on direct appeal, Massaro contends that, in light of the Supreme Court's holding in *United States v. Lopez*, 514 U.S. 549, 114 S.Ct. 1624 (1995), there has been an intervening change of law which enables him to relitigate this issue.[2] However, in *United States*

[1] The Hobbs Act provides: "Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both." 18 U.S.C. § 1951(a). Massaro is challenging the jury's findings with respect to four RICO predicate acts (Racketeering Acts Two, Five, Six and Eight) and Count Six (conspiracy to extort Partner's Lounge).

[2] The opinion in *Lopez* was issued 9 days after Massaro's appeal was argued in the Second Circuit, and 22 days before the Court of Appeals' issued its unpublished decision affirming his conviction. Thus, it is not clear that the Second Circuit did not consider this decision before issuing its unpublished decision. The Court's unpublished decision did not discuss the jurisdictional issue.

v. *Farrish*, 122 F.3d 146 (2d Cir. 1997), the Second Circuit held that *Lopez* did not alter the interstate commerce element required under the Hobbs Act. Thus, Massaro's previously litigated jurisdictional claim does not come within the exception for an intervening change in the applicable law.

Farrish involved a conviction under the Hobbs Act for stealing cars from the Chelsea Parking Garage. There, the Second Circuit explained that "appellant argues that the Commerce Clause requires more than a de minimis effect on interstate commerce to trigger Hobbs Act jurisdiction . . . that *Lopez* changed the jurisdictional requirement of the Hobbs Act." *Id.* at 148. The Court concluded that: "*Lopez* did not raise the jurisdictional hurdle for bringing a Hobbs Act prosecution. . . . We find nothing in *Lopez* to suggest that the Court intended to heighten the threshold for establishing jurisdiction under [the Hobbs Act]. Accordingly, we reaffirm that to satisfy the jurisdictional element of the Hobbs Act, the Government need only show a 'minimal' effect on interstate commerce." *Id.* at 148-49. Without an intervening change in the applicable law, Massaro may not relitigate the same issues that he argued on direct appeal.

B) *Claims that could have been raised on direct appeal*

The Second Circuit has consistently held that a defendant who fails to raise an issue on direct appeal is barred, as a general rule, from raising it subsequently in an attempt to vacate judgment. *Riascos-Prado*, 66 F.3d at 34-35. Unless Massaro can show that "there was cause for failing to raise the issue, and prejudice resulted therefrom," he is procedurally barred from raising those claims that could have been raised on appeal. *United States v. Pipitone*, 67 F.3d 34, 38-(2d Cir. 1995). Therefore, Massaro's claim that the government's failure to turn over statements by Mark Carney in violation of *Brady v. Maryland* is procedurally barred.

Although there is greater latitude for petitioners to assert ineffective assistance of counsel claims for the first time in § 2255 petitions, rather than on direct appeal, because Massaro was represented by new counsel on appeal and each of the grounds he asserts to support this claim was apparent from the trial record, Massaro is procedurally barred from asserting his claims of ineffective assistance of counsel. *Billy-Eko v. United States*, 8 F.3d 111 (2d Cir. 1993) (superseded by statute on other grounds).

1) Carney's statements in Presentence Investigation Report

Racketeering Act Eight of Count One charged Massaro with conspiring to extort the "owners and operators . . . and persons associated with" the Carousel Lounge topless bar. The second and third parts of that Racketeering Act also charged Massaro with committing, and conspiring to commit, arson of that bar on three separate occasions. The Presentence Investigation Report, prepared January 13, 1994, reported that Mark Carney had related that "although his bar suffered three fires, he was at no time aware that Massaro was the perpetrator . . . he was never threatened nor were any attempts at extortion made against the Carousel Lounge . . . Carney reported that neither he nor his bar were victimized." Massaro contends that the failure to disclose these statements before his trial constitutes a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where evidence is material to either guilt or to punishment." *Id.* at 87.

Carney's statements were clearly revealed in the Presentence Report. Massaro could have raised this *Brady* argument either at the time of sentence or on direct appeal. Massaro has not proffered any cause for his failure to raise this claim at those earlier opportunities. Nor does Massaro contend that the failure to raise the Carney statement on appeal resulted from

ineffective assistance of appellate counsel. Accordingly, I do not reach the merits of this issue which is barred procedurally.

2) Ineffective Assistance of Counsel

Massaro lists many "failures" of his retained trial counsel. These include contentions that his trial counsel: (1) failed to preserve a challenge to the jury instructions under the Supreme Court's opinion in *Reves v. Ernst & Young*, 507 U.S. 170, 113 S.Ct. 1163 (1993); (2) failed to take advantage of the continuance or otherwise attend to the bullet evidence; (3) refused to allow Massaro to testify; (4) failed to interview or call "certain" witnesses; (5) failed to object to evidence of Massaro's state extortion conviction; (6) failed to insist that the jury be instructed that state law conspiracy requires proof of an overt act; (7) failed to object to the manner in which the jury reviewed the trial transcript; and (8) failed to object to the scope of Special Agent Pistone's testimony.

Each of these alleged defaults of counsel could have been raised by Massaro's new counsel on appeal and are thus procedurally barred. The Second Circuit has recognized that often it is inappropriate to impose a procedural bar on Sixth Amendment ineffective assistance of counsel claims raised for the first time in petitions for habeas corpus, because "resolution [of ineffective assistance] claims often requires consideration of matters outside the record on direct appeal," and because, in many instances, the defendant is represented by the same counsel at trial and direct appeal, making it "unrealistic to expect that trial counsel would be eager to pursue an ineffective assistance of counsel claim." *Billy-Eko*, 8 F.3d at 114. However, "if defendant has new appellate counsel on direct appeal, and the record is fully developed on the ineffective assistance claim, there is little reason to extend the defendant an unlimited opportunity to delay bringing the claim." *Id.* at 115. *See also Abbamonte v. United States*, 160 F.3d 925, 925 (2d Cir. 1998). Massaro was represented by new counsel on appeal, and each of the bases for his ineffective assistance of trial counsel could have been argued on direct appeal.

C) *Claims that are meritless*

Massaro's additional claims — that the government failed to turn over two pieces of information about Alphonse D'Arco that might have provided additional material for cross-examination, and that the government violated 18 U.S.C. § 201(c)(2) — lack merit.

1) D'Arco evidence

Alphonse D'Arco, Massaro's former boss in the Luchese Crime Family, was a witness at trial. Massaro contends that the government withheld information set out in an application for an eavesdropping warrant about D'Arco's involvement in narcotics, and that the government withheld a psychological profile of D'Arco. The government essentially concedes that it should have known that these documents existed. For the reasons discussed below, the government's failure to disclose these documents does not support a new trial.

As the Second Circuit has noted, "undisclosed impeachment evidence is not material in the *Brady* sense when, although 'possibly useful to the defense,' it is 'not likely to have changed the verdict.' For example, where the undisclosed evidence merely furnishes an additional basis on which to challenge a witness whose credibility has already been shown to be questionable or who is subject to extensive attack by reason of other evidence, the undisclosed evidence may be cumulative, and hence not material." *United States v. Avellino*, 136 F.3d 249, 257 (2d Cir. 1998) (internal citations omitted). Neither the eavesdropping application nor the psychological profile would have furnished significant additional bases to impeach D'Arco on cross-examination. At trial, D'Arco was impeached by his many admissions of past criminal activity. Moreover, D'Arco was not the main witness against Massaro. Indeed, D'Arco did not testify about any essential element of

the crimes charged, but rather provided an "insider's view" of the hierarchy and business dealings of the Luchese Family. D'Arco was only one of more than forty other witnesses, including several of the victims of Massaro's crimes, forensic experts and law enforcement witnesses, who helped establish the government's case against Massaro. As in *Avellino*, "the undisclosed evidence merely furnishes an additional basis on which to challenge a witness whose credibility has already been shown to be questionable or who is subject to extensive attack by reason of other evidence." *Avellino*, 136 F.3d at 257.

2) Singleton Claim

In his reply brief, Massaro raises, for the first time, a claim based on the Tenth Circuit's opinion in *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998). The opinion he relies on has been overruled by the Tenth Circuit sitting *en banc*, 165 F.3d 1297 (10th Cir. 1999), and has been rejected by the Second Circuit in *United States v. Stephenson*, 183 F.3d 110, 118 (2d Cir. 1999).

III. **Conclusion**

For the foregoing reasons, this petition and this motion for a new trial are denied.

SO ORDERED.

Dated: New York, New York
November 29, 2000

/s/ Miriam Goldman Cedarbaum

MIRIAM GOLDMAN CEDARBAUM
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPH MASSARO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

97 Civ. 2971 (MGC)

Certificate of Appealability

CEDARBAUM, J.

Joseph Massaro has requested that I issue a certificate of appealability to enable him to appeal my recent decision denying his motion pursuant to 28 U.S.C. § 2255. A certificate of appealability can only issue if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

The only issue that warrants a certificate of appealability is whether trial counsel's decision not to accept a continuance after receiving important new information from the government, which Massaro now characterizes as a deprivation of his right to effective assistance of counsel, is procedurally barred by the failure of new appellate counsel, who raised the issue of the government's belated disclosure, to also argue that issue under the rubric of ineffective assistance of counsel.

SO ORDERED.

Dated: New York, New York
December 26, 2000

/s/ Miriam Goldman Cedarbaum

MIRIAM GOLDMAN CEDARBAUM
United States District Judge

97cv2971
Cedarbaum, J.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 14th day of March two thousand and one.

Present:

Hon. Joseph M. McLaughlin,
Hon. Sonia Sotomayor,
Circuit Judges.
Hon. William O. Bertelsman,
District Judge.

UNITED STATES COURT OF APPEALS
FILED MAR 14 2001
Roseann B. MacKechnie, Clerk
SECOND CIRCUIT

Joseph Massaro,

Movant-Appellant,

v. 00-2720

United States of America,

— Respondent-Appellee.

Appellant has filed a motion to expand the certificate of appealability issued by the district court. Upon due consideration, it is ORDERED that the motion is granted to the extent that

the certificate of appealability is expanded to include the following issue: whether the district court correctly found that appellant's claim that his trial counsel acted ineffectively when he refused to allow appellant to testify was procedurally barred based on appellant's failure to raise the claim on direct appeal. *See Billy-Eko v. United States*, 8 F.3d 111, 114 (2d Cir. 1993). The parties are advised that the Court recently granted a certificate of appealability and heard argument on the following issue which is directly relevant to this case: whether the district court correctly found that a habeas petitioner must do more than merely make a bare allegation that his trial counsel ineffectively refused to allow him to testify in order to successfully attack his conviction. *See Chang v. United States*, USCA dkt. no. 99-2471; *see also Underwood v. Clark*, 939 F.2d 473 (7th Cir. 1991); *United States v. McMeans*, 927 F.2d 163 (4th Cir. 1991); *United States v. Martinez*, 883 F.2d 750 (9th Cir. 1989); *Siciliano v. Voss*, 834 F.2d 29 (1st Cir. 1987).

In all other respects appellant's motion is denied. *See Barber v. Scully*, 731 F.2d 1073, 1075 (2d Cir. 1984). Appellant has not made a "substantial showing of the denial of a constitutional right" with regard to the remaining issues on which the district court declined to grant a certificate of appealability. 28 U.S.C. § 2253(c).

FOR THE COURT
Roseann B. MacKechnie, Clerk
By: /s/ Lucille Carr

MAR 14 2001

SDNY-NYNY
92-cr-529
CEDARBAUM

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the 18th day of May, one thousand nine hundred and ninety-five.

Present:

HON. FRANK X. ALTIMARI,
HON. DENNIS G. JACOBS,
HON. GUIDO CALABRESI,

Circuit Judges.

UNITED STATES COURT OF APPEALS
FILED MAY 18 1995
George Lang III, Clerk
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-v.- 94-1447

JOSEPH MASSARO, also known as
Joey Bang Bang,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York (Cedarbaum, *J.*), and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of the district court be and it hereby is AFFIRMED.

Defendant-appellant Joseph Massaro ("Massaro") appeals from a judgment entered, after trial to a jury, in the United States District Court for the Southern District of New York convicting him of conspiring to conduct and participate in the affairs of a racketeering enterprise in violation of 18 U.S.C. § 1962(d) ("RICO"); participating in the conduct of the affairs of the enterprise in violation of 18 U.S.C. § 1962(c); murder in aid of racketeering in violation of 18 U.S.C. §§ 1959(a)(1), (2); three counts of extortion in violation of 18 U.S.C. §§ 1951 and 2; conspiracy to make extortionate extensions of credit and to use extortionate means to collect in violation of 18 U.S.C. §§ 892, 894; loansharking in violation of 18 U.S.C. §§ 893, 2; and traveling interstate in aid of the extortion racketeering counts in violation of 18 U.S.C. §§ 1952 and 2.

Massaro, a soldier of the Lucchese Organized Crime Family ("the Family"), ran a business called the Entertainment Plus Agency ("Monterrey") that booked topless dancers for local clubs. The evidence at trial demonstrated that, in an effort to take over Long Island's topless bar industry, Massaro waged a campaign of intimidation to persuade clubs and bars to book dancers through Monterrey rather than its competition. Toward this end, Massaro assaulted and threatened the owner of rival booking agency, "Tiffany's," Glen Hudson ("Hudson"), the owner, testified at trial. In early 1986, while Hudson was on vacation, Massaro and Patrick Esposito

("Esposito"), a cohort who became the government's key witness at trial, persuaded Hudson's business partner to accept Massaro as a partner in Tiffany's. Upon Hudson's return, he was met at the business by Esposito who told him that he could either accept a $10,000 pay-off to get out of the business, or wind up in the hospital. Instead, Hudson went to work for a new booking agency controlled by a different organized crime family. Massaro soon merged Tiffany's with his existing business and called the new enterprise "Startime."

In the late 1980s, Massaro sought to expand his control over Long Island's topless bar industry. An associate in Massaro's crew, Joseph Fiorito ("Fiorito"), twice tried to burn down the Carousel Lounge at Massaro's direction because it had defected from Startime. Esposito and Fiorito also set fire to the Excaliber and the Class Act Bar, clubs whose owners either refused to use Startime or declined to make pay-offs, or both. Three other area bars that had stopped using Startime were left alone because they were, by then, purportedly controlled by the Gambino Organized Crime Family.

Massaro also attempted to take over a non-topless bar in Babylon, Partner's Lounge ("Partner's"). After staging a robbery, Massaro began extorting the bar owner. However, by the time Esposito, with the Family's approval, decided to oust Gene Kruse ("Kruse"), the bar's owner, Kruse had gone to the Suffolk County District Attorney's Office. Kruse, who also testified at trial, began recording his conversations with Esposito, Fiorito and Massaro. Kruse began making his weekly payments in marked bills, and also arranged to borrow money from Massaro. In addition, Massaro and his henchmen extorted two construction industry firms, American Application Associates of New Jersey and Keith Gabel Construction, which together owed $75,000 to a business called Expert Rigging and Scaffolding. Massaro and Esposito collected the debts, pocketing half the payments. The two businesses complied because Massaro threatened their staffs

with physical injury, harm to their children, and union trouble. Finally, Massaro ran a successful loansharking operation, as well as an illegal horse betting parlor.

By the end of the summer of 1989, Massaro had determined to kill Fiorito because Fiorito had been stealing from him. Together with Esposito, Massaro lured him to an empty home located on Butterfly Lane in Hauppauge on September 19, 1990. After shooting Fiorito once in the head in the basement of the house, Massaro, with Esposito's help, carried the body up the stairs and through several rooms on the first floor before going out a side entrance. They placed the body in a sitting position on the rear seat of the car that had been driven by Fiorito, with the head resting on the middle of the seat. As they crossed into New York City, Massaro, expressing concern that Fiorito might not be dead, again shot him in the head. Massaro and Esposito pulled over in a Queens neighborhood and propped the body up so that it would appear to be sleeping. Leaving Fiorito's body in the car, the two left in a different vehicle with an associate who had followed them.

The next day, Massaro sent crew members to Butterfly Lane to clean up the basement and retrieve the shell casing. The men reported that they found the casing but that there was too much blood to be removed without special materials. Early on September 21, the New York City police discovered Fiorito's body, lying across the back seat of the parked car with the head pointing down toward the driver's side floor. The police found a spent shell casing on the floor behind the passenger seat, but no bullet. Likewise, they found no bullet and no blood in the front seat.

Although Esposito had retained counsel, he began cooperating with the government through court-appointed counsel. His information led the police to the murder scene where they discovered dried blood, remnants of brain matter, and a plastic bag in which the body had been wrapped when it was

carried through the house. Massaro was arrested in June 1992. After state criminal charges against Esposito were dismissed as a result of his cooperation, the car used to transport Fiorito's body, and in which he was shot for a second time, was released from state custody. It had not been thoroughly searched.

Trial commenced in the district court on September 7, 1993. Several days before trial, police sergeant Richard Carbone ("Carbone") succeeded in tracking down Fiorito's car. Carbone searched the car again, lifting up its carpeting, but found nothing. As an indirect result of this search, however, the new owner of the car discovered a hole in the floorboard, and a bullet. On September 6, 1993, the day before opening statements, the car's new owner advised the government of the discovery.

The defense's theory, as presented in its opening statement on Tuesday, September 7, 1993, was that Esposito alone murdered Fiorito. In the course of arguing that Massaro had no motive to murder Fiorito, and that no physical evidence linked him to the crime, counsel claimed that, "[t]here is no one scientific shred of evidence to indicate that Joseph Massaro was in that car, was in that place, or had anything to do with this case. . . ." The government did not refer to the bullet in its opening statement.

On Saturday, September 11, 1993, the government advised, by faxed letter, Massaro's lawyer of the existence of the bullet, and offered to make available a videotaped reenactment of its discovery. When the trial resumed on Monday, counsel never mentioned the bullet. On Thursday, September 23, 1993, counsel raised the issue with the court and sought to expedite the ballistics tests. The government indicated that it did not yet know whether it would offer the bullet into evidence. Massaro neither sought to preclude the bullet, nor requested a continuance pending the forensic results. Sometime before trial on the following Monday, September 27,

1993, the government advised Massaro that its expert had concluded that the bullet matched the fragments recovered from the body, and had probably been fired from the same gun.

The next day, Massaro moved for a mistrial, or, in the alternative, to preclude admission of the bullet because of the late disclosure by the government. The district court rejected the motion for a mistrial and ruled that the bullet evidence was admissible because neither the opening statements nor the evidence adduced to date had irretrievably committed Massaro to a defense position. The court offered a continuance to allow Massaro to examine the evidence and make any necessary adjustments to his strategy. The court also allowed Massaro to recall any witnesses in light of the newly discovered evidence. Massaro recalled one investigator, but declined the continuance. Over objection, and after rejecting a motion for a mistrial, the district court admitted the bullet evidence.

We address Massaro's claim on appeal that the district court erred in admitting the bullet evidence. Massaro challenges the government's handling of the bullet evidence. Federal Rule of Criminal Procedure 16(a)(1)(C) requires the production by the government of any tangible items or documents "which are within the possession, custody, or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at trial." Rule 16 rulings by the district court are reviewed for the abuse of discretion. *See United States v. Sanchez*, 912 F.2d 18, 21 (2d Cir. 1990). Reversal is warranted where nondisclosure by the government results in substantial prejudice to the defendant's ability to present a strategy. *Id.* In determining whether substantial prejudice has accrued, the Court looks to (1) the nature of the untimely evidence; (2) the extent to which it went to critical issues; (3) the reason that it was not timely produced; and (4)

the strength of the remainder of the government's case. *See United States v. Stevens*, 985 F.2d 1175, 1181 (2d Cir. 1993).

We conclude that, although the government's five-day delay in advising the defense of the discovery of the bullet was regrettable, it was not error to admit the evidence. There is no question but that the government should have advised the defense immediately of the bullet's discovery. However, the government's conduct did not irreparably damage Massaro's strategy. Massaro had given his opening statement and begun cross-examination of Esposito before learning about the bullet. Massaro has not claimed that he would have changed his cross-examination had he been aware of the bullet. Thus, we address only the opening statement.

Massaro's defense strategy was to impugn Esposito's credibility by arguing that it was inherently incredible, given the lack of hard evidence, that the second shot ever occurred. He intended to argue to the jury that, if Esposito could not be believed in this detail, none of his testimony was trustworthy. Nothing in his opening statement, however, was rendered false by the bullet evidence. That fact makes this case distinguishable from *People v. Thompson*, 71 N.Y.2d 918, 523 N.E.2d 819, 528 N.Y.S.2d 532 (1988), upon which Massaro relies. There, the New York Court of Appeals reversed a conviction because the government withheld a witness's prior statement until the defense was already irrevocably committed to its strategy of suggesting that the witness was not credible. In this case, the district court properly determined that Massaro had not yet committed himself to an untenable position. Further, the defense had ample other detrimental information with which to attack Esposito's credibility. Massaro's rejection of a continuance supports our conclusion. Massaro cites *United States v. Kelly*, 420 F.2d 26, 29 (2d Cir. 1969), for the proposition that a continuance would not have adequately addressed the problem. In fact, the *Kelly* court suggested that it was error not to grant a continuance, *id.* at

29, thus implying that a continuance would have cured the injury. Massaro's failure to avail himself of the offer of a continuance calls into doubt the claim of error. *See, e.g., United States v. Boney*, 572 F.2d 397, 402-03 (2d Cir. 1978). Massaro's decision to proceed with his strategy despite his knowledge that the bullet might be matched to existing shell fragments weakens his claim. We cannot conclude that there was substantial prejudice to Massaro as a result of the government's delay in advising the defense of the bullet's discovery; the district court did not abuse its discretion in admitting the evidence.

Massaro's remaining claims having been carefully considered, we AFFIRM the judgment of the district court.

/s/ Frank X. Altimari

HON. FRANK X. ALTIMARI.

/s/ Dennis Jacobs (by FXA)

HON. DENNIS JACOBS.

/s/ Guido Calabresi (by FXA)

HON. GUIDO CALABRESI.

Circuit Judges.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN THE UNRELATED CASES BEFORE THIS OR ANY OTHER COURT

Supreme Court U.S.
FILED
JUL 8 2002
OFFICE OF THE CLERK

No. 01-1559

In the Supreme Court of the United States

JOSEPH MASSARO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
MICHAEL CHERTOFF
Assistant Attorney General
ELIZABETH D. COLLERY
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly affirmed the denial of petitioner's motion to vacate his conviction under 28 U.S.C. 2255 on the basis of ineffective assistance of counsel because petitioner did not demonstrate cause and prejudice for his failure to raise that claim on direct appeal of his conviction.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	8
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Billy-Eko v. *United States*:	
509 U.S. 901 (1993)	10
8 F.3d 111 (2d Cir. 1993)	7, 9, 11
Chappell v. *United States*, 494 U.S. 1075 (1990)	10
Diaz-Albertini v. *United States*, 498 U.S. 1061 (1991)	10
Duarte v. *United States*, 81 F.3d 75 (7th Cir. 1996)	9
Guinan v. *United States*, 6 F.3d 468 (7th Cir. 1993)	9
Knight v. *United States*, 37 F.3d 769 (1st Cir. 1994)	10
Ortega-Rodriguez v. *United States*, 507 U.S. 234 (1993)	12
Thomas v. *Arn*, 474 U.S. 140 (1985)	12
United States v. *Casamayor*, 837 F.2d 1509 (11th Cir. 1988), cert. denied, 488 U.S. 1017 (1989)	9
United States v. *Cronic*, 466 U.S. 648 (1984)	10
United States v. *DeRewal*, 10 F.3d 100 (3d Cir. 1993), cert. denied, 511 U.S. 1033 (1994)	9, 10
United States v. *Frady*, 456 U.S. 152 (1982)	8
United States v. *Galloway*, 56 F.3d 1239 (10th Cir. 1995)	9, 10
United States v. *Kellum*, 42 F.3d 1087 (7th Cir. 1994)	9

Cases—Continued: Page

United States v. *Mal*, 942 F.2d 682 (9th Cir. 1991) 9, 11
United States v. *Mala*, 7 F.3d 1058 (1st Cir. 1993), cert. denied, 511 U.S. 1086 (1994) 9
United States v. *Massaro*, 57 F.3d 1063 (2d Cir.), cert. denied, 516 U.S. 933 (1995) 2
United States v. *Pruitt*, 156 F.3d 638 (6th Cir. 1998), cert. denied, 525 U.S. 1091 (1999) 9, 11
United States v. *Richardson*, 167 F.3d 621 (D.C. Cir.), cert. denied, 528 U.S. 895 (1999) 9
United States v. *Sevick*, 234 F.3d 248 (5th Cir. 2000) 9, 11
United States v. *Smith*, 62 F.3d 641 (4th Cir. 1995) 9, 11
United States v. *Thompson*, 972 F.2d 201 (8th Cir. 1992) 9, 11
Wainwright v. *Sykes*, 433 U.S. 72 (1977) 8

Statutes:

Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. 1962:
18 U.S.C. 1962(c) 2
18 U.S.C. 1962(d) 2
18 U.S.C. 892 2
18 U.S.C. 893 2
18 U.S.C. 894 2
18 U.S.C. 1951 2
18 U.S.C. 1952 2
18 U.S.C. 1959(a)(1) 2
28 U.S.C. 2255 ..... 2, 6, 9, 10, 11, 12

In the Supreme Court of the United States

No. 01-1559

JOSEPH MASSARO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The summary order of the court of appeals (Pet. App. A3-A10) is unreported. The opinion of the district court (Pet. App. A16-A26) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 2001. A petition for rehearing was denied on January 14, 2002 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on April 15, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner

was convicted of conspiracy to conduct and participate in the conduct of the affairs of a racketeering enterprise, in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1962(d); participating in the conduct of the affairs of the racketeering enterprise, in violation of 18 U.S.C. 1962(c); murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1); three counts of conspiracy to commit extortion, in violation of 18 U.S.C. 1951; conspiracy to make extortionate extensions of credit and to use extortionate means to collect extensions of credit, in violation of 18 U.S.C. 892, 894; loansharking, in violation of 18 U.S.C. 893; and traveling interstate in aid of the extortion counts, in violation of 18 U.S.C. 1952. Pet. App. A31. Petitioner was sentenced to life imprisonment and a $240,000 fine, and was ordered to pay $104,100 in restitution. *Id.* at A6, A18. The court of appeals affirmed. *United States* v. *Massaro*, 57 F.3d 1063 (2d Cir.) (Table) (*reprinted in* Pet. App. A30-A37), cert. denied, 516 U.S. 933 (1995).

Petitioner then filed a motion under 28 U.S.C. 2255 challenging his convictions. The district court denied the motion. Pet. App. A16-A26. The court of appeals affirmed. *Id.* at A3-A10.

1. From at least the late 1970s until his arrest on June 24, 1992, petitioner was a "soldier" in the Luchese Organized Crime Family and actively participated in its various illicit affairs. As a Luchese soldier, petiioner's racketeering activity included using threats, violence, extortion and arson to secure and expand his control over Long Island's topless bar industry, extorting several other business establishments, and operating a loansharking business throughout Long Island, Brooklyn, and Queens, as well as a horse betting parlor in Queens. Gov't C.A. Br. 4-6; Pet. App. A4-A5, A31-A33.

On September 20, 1990, petitioner murdered his racketeering associate, Joseph Fiorito, because of Fiorito's failure to remit gambling proceeds and other monies. Gov't C.A. Br. 5; Pet. App. A33. Petitioner had Patrick Esposito, another racketeering associate, lure Fiorito to a vacant house in Hauppauge, Long Island, by telling Fiorito that they were going to commit an arson at the home. Gov't C.A. Br. 14; Pet. App. A33. Petitioner was waiting in the basement of the house and shot Fiorito in the head. Petitioner and Esposito then carried Fiorito's body up the stairs and through the first floor into the garage. They placed the body in a sitting position in the rear passenger seat of Fiorito's car, leaning across the seat with the head resting just past the transmission hump. Gov't C.A. Br. 14-15; Pet. App. A18-A19, A33.

As petitioner and Esposito drove away from the murder site in Fiorito's car, petitioner expressed concern that Fiorito was not dead and shot him a second time. Petitioner instructed Esposito to park Fiorito's car in a residential area in Queens, and to pull Fiorito's body across the back seat so that Fiorito would appear to be asleep. Petitioner and Esposito then got into a car driven by Joseph Kern, another of petitioner's associates. Gov't C.A. Br. 15; Pet. App. A33. Later that day, Kern and another man returned to the vacant house at petitioner's direction and recovered the shell casing from the first shot. Esposito confessed to his girlfriend on returning home that "they" had just killed Fiorito. Gov't C.A. Br. 16; Pet. App. A19, A33.

In the early morning of September 21, 1990, a New York City Police Officer discovered Fiorito's body in his parked car. When the police removed the body, they discovered a spent shell casing on the floor behind the passenger seat but did not find a bullet. Later that

same day, the police, alerted by Esposito's girlfriend, arrested Esposito outside his home and recovered his bloodstained clothing from a dumpster. Esposito agreed to cooperate with police and implicated petitioner in the crime. Gov't C.A. Br. 16-17; Pet. App. A19, A33.

2. On September 6, 1993, the day before opening statements in petitioner's trial, the new owner of Fiorito's car notified the government that, while removing the carpet in the rear of the car, he had discovered a bullet, as well as a hole in the carpet near the transmission hump. The government informed petitioner's counsel of that development by a faxed letter on Saturday, September 11, 1993. Gov't C.A. Br. 18, 30-31; Pet. App. A19, A34. In the meantime, defense counsel had delivered an opening statement arguing that Esposito had murdered Fiorito alone and that no physical evidence linked Massaro to the crime. Gov't C.A. Br. 30-31; Pet. App. A5.

On Thursday, September 23, 1993, defense counsel first raised the issue of the bullet with the district court (Cedarbaum, J.) and sought to expedite the government's ballistics tests. Before trial resumed on Monday, September 27, 1993, the government informed defense counsel that the ballistics expert had concluded that the bullet matched the shell fragments found in Fiorito's head and had probably been fired from the same gun. Gov't C.A. Br. 31-33; Pet. App. A34. On the following day, defense counsel moved for a mistrial, or, in the alternative, to preclude the admission of the bullet into evidence, on the basis of the government's late disclosure of the bullet. In connection with that motion, counsel claimed that the new evidence severely undermined the defense theory chosen in advance of trial. That strategy, aimed at discrediting Esposito's

account of the murder, was based in part on the lack of blood spatter in Fiorito's car or any scientific evidence indicating that a shot had been fired there. The district court denied the motion for a mistrial. It also concluded that the bullet evidence would be admissible because the government's delay did not irreparably prejudice petitioner's defense. Gov't C.A. Br. 33-34; Pet. App. A20, A35.

At the same time, the district court offered defense counsel a continuance to examine the evidence and adjust his defense strategy if necessary, and ruled that petitioner could recall any of the witnesses who had previously testified. Gov't C.A. Br. 34; Pet. App. A35. Petitioner's counsel declined a continuance, noting that a continuance was not necessary for the defense ballistics expert to examine the bullet.[1] Petitioner's counsel also argued that there was no use in a continuance, because the damage to his defense theory that the shooting had not taken place in the car was irreparable. Defense counsel did elect, however, to recall one of the crime scene investigators. Gov't C.A. Br. 34-35.

3. On appeal, petitioner retained new counsel, who argued, *inter alia*, that the district court erred in admitting the bullet into evidence. The court of appeals affirmed in an unpublished opinion only addressing that claim. Pet. App. A30-A37. Like the district court, the court of appeals concluded that "the government's conduct [in waiting five days before disclosing the discovery of the bullet] did not irreparably damage Massaro's strategy." *Id.* at A36. In particular, "[n]othing in his opening statement * * * was

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[1] As the trial proceeded, petitioner's ballistics expert examined the bullet and determined that it matched the shell fragments that had been recovered from Fiorito's head. Gov't C.A. Br. 34.

rendered false by the bullet evidence" and "the defense had ample other detrimental information with which to attack Esposito's credibility." *Ibid.* The court added that its conclusion was supported by trial counsel's decision to decline a continuance, explaining that "Massaro's decision to proceed with his strategy despite his knowledge that the bullet might be matched to existing shell fragments weakens his claim" of prejudice. *Id.* at A37.

4. On April 24, 1997, petitioner filed a motion under 28 U.S.C. 2255 seeking to vacate his conviction. The motion claimed, *inter alia*, that trial counsel rendered ineffective assistance by failing to seek a continuance upon learning of the bullet's discovery. After the district court determined that the motion was timely, Pet. App. A11-A13, the government filed an opposition arguing that petitioner's claims of ineffective assistance of counsel were procedurally barred because they had not been raised on direct appeal. Gov't Mem. of Law in Opp. to Joseph Massaro's Mot. for a New Trial and for Relief Under 28 U.S.C. § 2255, at 109-110 (Gov't Mem. of Law). In addition, the government argued that defense counsel's decision not to pursue a continuance was a reasonable trial strategy that did not irreparably prejudice the defense. *Id.* at 123-124.[2]

The district court denied petitioner's Section 2255 motion. Pet. App. A16-A26. The court found that petitioner's claims of ineffective assistance of counsel, including his claim that counsel should have sought a continuance once the bullet was discovered, were procedurally barred under *Billy-Eko* v. *United States*, 8 F.3d 111 (2d Cir. 1993), because the claims could have been raised on direct appeal and petitioner had failed to establish cause or prejudice for his default. Pet. App. A24-A25. The district court then granted petitioner a certificate of appealability limited to that issue. *Id.* at A27.[3]

[2] The government also explained in its memorandum that petitioner erred in contending that the bullet directly linked him to the crime. Gov't Mem. of Law 123; see Pet. 5 ("This bullet was the only physical evidence that connected the Petitioner to the murder."). In fact, the bullet did not directly link petitioner to the crime; instead, it merely provided corroborating evidence of Esposito's version of events, including his claim that Fiorito was shot a second time in the car.

5. The court of appeals affirmed in an unpublished summary order. Pet. App. A3-A10. The court concluded that petitioner could have raised on direct appeal his claim that trial counsel rendered ineffective assistance by failing to accept a continuance, noting that new counsel represented petitioner on direct appeal and that the claim was "based solely on the record adduced at trial and available to Massaro's appellate counsel on direct appeal." *Id.* at A7. The court explained that, although "a new set of experts allegedly reached different conclusions after trial" on whether the bullet found in Fiorito's car came from the same gun as the fragments recovered from his body, that "does not render the basis for Massaro's ineffective assistance claim outside the scope of the record adduced at trial." *Ibid.* "Moreover," the court added, "each of the issues raised by Massaro's most recent forensic analysis—the absence of blood in the vehicle, the absence of blood 'spatter' or other remnants, the belated discovery of the bullet after several searches—all were extensively addressed at trial." *Id.* at A7-A8. As a result, "the record available to Massaro's appellate

[3] The court of appeals subsequently expanded the certificate of appealability to include a second issue. Pet. App. A28-A29.

counsel fully revealed the implications of the failure to accept a continuance." *Id.* at A8. Because petitioner was unable to demonstrate cause for his default, the court found his ineffective assistance of counsel claim to be procedurally barred. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 8-16) that this Court should grant review to resolve a conflict among the courts of appeals on the question whether claims of ineffective assistance of counsel must be raised on direct appeal. It is true that courts differ slightly in their procedural rules for asserting claims of ineffective assistance of counsel. Nevertheless, this Court's plenary review is not warranted because a uniform national rule is not required for this procedural issue.

1. This Court has "long and consistently affirmed that a collateral challenge may not do service for an appeal." *United States* v. *Frady*, 456 U.S. 152, 165 (1982) (citing cases). When a defendant has failed to raise a claim both in the trial court and on direct appeal, he "must clear a significantly higher hurdle than would exist on direct appeal." *Id.* at 166. To obtain relief on collateral attack, the defendant must show both "cause" for failing to raise the issue before his conviction became final and "actual prejudice" resulting from the alleged error. *Id.* at 168; *Wainwright* v. *Sykes*, 433 U.S. 72, 84, 87 (1977).

Claims of ineffective assistance of counsel, however, often cannot be expected to be raised and disposed of on direct appeal. That is because the record on appeal typically does not permit the reviewing court to make an informed decision on a claim of ineffectiveness raised for the first time at that stage. In addition, if the same lawyer represents the defendant at trial and appeal, it

is unrealistic to expect that lawyer to argue on appeal that his own trial performance was ineffective. Accordingly, the courts of appeals have expressed a strong preference (or in some cases required) that ineffective assistance claims be presented to the district court in the first instance in a motion under Section 2255.[4]

The Second and Seventh Circuits have expressed a limitation on that general rule. Those courts require a defendant who is represented by new counsel on appeal and whose ineffective assistance claim can be decided on the trial record to raise that claim on direct appeal. If the defendant does not do so in that situation, those courts of appeals hold that principles of procedural default ordinarily bar the assertion of the ineffectiveness claim on collateral attack. See *Billy-Eko* v. *United States*, 8 F.3d 111 (2d Cir. 1993); *Guinan* v. *United States*, 6 F.3d 468, 472 (7th Cir. 1993); but cf. *Duarte* v. *United States*, 81 F.3d 75, 77 (7th Cir. 1996) (defendant may raise all of his ineffective assistance of counsel claims in a Section 2255 motion "whenever any important element of the challenge to counsel's performance could not have been presented on the original record").

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[4] See, *e.g.*, *United States* v. *Mala*, 7 F.3d 1058, 1063 (1st Cir. 1993), cert. denied, 511 U.S. 1086 (1994); *Billey-Elko* v. *United States*, 8 F.3d 111, 114 (2d Cir. 1993); *United States* v. *DeRewal*, 10 F.3d 100, 103-104 (3d Cir. 1993), cert. denied, 511 U.S. 1033 (1994); *United States* v. *Smith*, 62 F.3d 641, 651 (4th Cir. 1995); *United States* v. *Sevick*, 234 F.3d 248, 252 (5th Cir. 2000); *United States* v. *Pruitt*, 156 F.3d 638, 646 (6th Cir. 1998), cert. denied, 525 U.S. 1091 (1999); *United States* v. *Kellum*, 42 F.3d 1087, 1094-1095 (7th Cir. 1994); *United States* v. *Thompson*, 972 F.2d 201, 203-204 (8th Cir. 1992); *United States* v. *Mal*, 942 F.2d 682, 689 (9th Cir. 1991); *United States* v. *Galloway*, 56 F.3d 1239 (10th Cir. 1995) (en banc); *United States* v. *Casamayor*, 837 F.2d 1509, 1516 (11th Cir. 1988), cert. denied, 488 U.S. 1017 (1989); *United States* v. *Richardson*, 167 F.3d 621, 626 (D.C. Cir.), cert. denied, 528 U.S. 895 (1999).

In prior cases, the government has suggested that claims of ineffective assistance of trial counsel ordinarily should be raised in a motion under Section 2255 rather than on direct appeal, and that the failure to raise an ineffectiveness claim on direct appeal should not trigger a "cause and prejudice" inquiry. See *United States* v. *Cronic*, 466 U.S. 648, 667 n.42 (1984); see also *Billy-Eko* v. *United States*, 509 U.S. 901 (1993); *Diaz-Albertini* v. *United States*, 498 U.S. 1061 (1991); *Chappell* v. *United States*, 494 U.S. 1075 (1990).[5] The Third and Tenth Circuits have adopted that position, allowing defendants to raise a claim of ineffective assistance of counsel for the first time on collateral attack without requiring a showing of cause and prejudice, even though they might have been able to bring the claim on direct appeal. See *United States* v. *Galloway*, 56 F.3d 1239, 1242-1243 (10th Cir. 1995) (en banc); *United States* v. *DeRewal*, 10 F.3d 100, 103-105 (3d Cir. 1993), cert. denied, 511 U.S. 1033 (1994); see also *Knight* v. *United States*, 37 F.3d 769, 774 (1st Cir. 1994) ("[T]he failure to bring a claim of ineffective assistance of counsel on direct appeal is not subject to the cause and prejudice standard.").

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[5] In *Billy-Eko*, *Diaz-Albertini*, and *Chappell*, the courts had applied the cause and prejudice test to decline to entertain ineffective assistance claims not brought on direct appeal. In each of those cases, this Court granted the petition, vacated the judgment, and remanded for further consideration in light of the position asserted by the United States. Following those remands, the Second Circuit adhered to its limited application of the cause-and-prejudice rule in *Billy-Eko*, 8 F.3d at 114-116. The Tenth Circuit, since the remand in *Diaz-Albertini*, has adopted the government's suggested approach. The Seventh Circuit, since the remand in *Chappell*, has adhered to its version of the cause-and-prejudice test in this setting.

Other courts, while generally preferring that ineffectiveness claims be raised for the first time in a motion under Section 2255, allow review of such claims on direct appeal in some cases. Those courts have not made clear whether they would require a showing of cause and prejudice to excuse the failure to raise an ineffectiveness claim on direct appeal. See, *e.g.*, *United States* v. *Smith*, 62 F.3d 641, 651 (4th Cir. 1995); *United States* v. *Sevick*, 234 F.3d 248, 251 (5th Cir. 2000); *United States* v. *Pruitt*, 156 F.3d 638, 646 (6th Cir. 1998), cert. denied, 525 U.S. 1091 (1999); *United States* v. *Thompson*, 972 F.2d 201, 203-204 (8th Cir. 1992); *United States* v. *Mal*, 942 F.2d 682, 689 (9th Cir. 1991).

2. Although the courts of appeals differ in their procedural rules in this area, review by this Court is not warranted. As an initial matter, the result in this case is not unfair to petitioner. By the time of petitioner's direct appeal, the Second Circuit had made clear that a claim of ineffective assistance of trial counsel must be raised on direct appeal when the defendant has new appellate counsel and the claim does not require factual development, and that if the claim is not raised it will be subject to cause and prejudice analysis on collateral attack. See *Billy-Eko* v. *United States*, 8 F.3d 111 (2d Cir. 1993). Petitioner's new counsel on appeal thus was on notice of that rule. Counsel's decision to omit an ineffectiveness claim from the direct appeal, even though the basis for the claim was apparent from the trial record, thus constituted a waiver, absent a showing of cause and prejudice.

Nor is this Court's review required to formulate a uniform procedural rule for the courts of appeals on this issue. Although the courts of appeals do not follow a single approach, each of the competing rules has advantages, and none forecloses litigation over poten-

tially meritorious claims. As the government has argued, a rule allowing a defendant to raise a claim of ineffective assistance of counsel on collateral review without being required to show why the claim could not have been raised on direct appeal is easy to administer and avoids time-consuming litigation over issues of cause and prejudice. It also ensures that the district court has an opportunity to pass on all ineffectiveness claims under 28 U.S.C. 2255 before their presentation to an appellate court. But the rule in the Second and Seventh Circuits, which imposes a procedural default in a limited class of cases, has its own advantages. When a defendant is represented by different counsel on direct appeal and there is no need for record development on the ineffectiveness claim, it is not unfair to expect the defendant to raise the claim of ineffective assistance at that time. Nor is it unfair for the courts to apply the cause and prejudice test if such a defendant, having notice of the general requirement to raise an ineffectiveness claim on direct appeal in those circumstances, fails to raise the claim. Such an approach accelerates the resolution of some ineffectiveness claims, and thereby hastens the resolution of the legal challenges to a conviction.

The choice of which procedural rule to adopt is not an issue requiring a uniform national solution. See *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 251 n.24 (1993); *Thomas* v. *Arn*, 474 U.S. 140, 146 (1985). The issue does not ultimately affect the merits of an ineffectiveness claim. Once a circuit has established a procedural rule, defendants are on notice of the appropriate time to present an ineffectiveness claim. And regardless of the precise procedure adopted, a defendant has at least one opportunity to raise an ineffectiveness claim in an appellate court. Accordingly, this

Court has repeatedly declined to grant review in similar cases presenting the same issue. See *Moghal* v. *United States*, cert. denied, 519 U.S. 835 (1996) (No. 95-9027); *Velasquez* v. *United States*, cert. denied, 516 U.S. 1160 (1996) (No. 95-6925); *Sprecher* v. *United States*, cert. denied, 516 U.S. 913 (1995) (No. 95-82). There is no reason for a different result here.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
MICHAEL CHERTOFF
Assistant Attorney General
ELIZABETH D. COLLERY
Attorney

JULY 2002

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[6] Petitioner notes that in *Sprecher*, the Solicitor General argued against certiorari review on the ground that the district court had actually considered each aspect of the defendant's ineffective assistance of counsel claim. Pet. 12 n.7. No such argument was made, however, in response to the *Velasquez* and *Moghal* certiorari petitions. See Br. in Opp. 6-11, *Velasquez* v. *United States*, cert. denied, 516 U.S. 1160 (1996) (No. 95-6925); Br. in Opp. 5-11, *Moghal* v. *United States*, cert. denied, 519 U.S. 835 (1996) (No. 95-9027) (available at 1996 WL 935681, at *3-*5).

(3)

Supreme Court, U.S.
FILED
JUL 18 2002
OFFICE OF THE CLERK

No. 01-1559

In the
Supreme Court of the United States

JOSEPH MASSARO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI

HERALD PRICE FAHRINGER
Counsel of Record
ERICA T. DUBNO
LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY
& CAMBRIA LLP
780 Third Avenue
New York, NY 10017
(212) 319-5351

Counsel for Petitioner

Of Counsel:
EUGENE GRESSMAN
Univ. of North Carolina
School of Law
Chapel Hill, NC 27599
(919) 962-3688

295

TABLE OF CONTENTS

	Page
THE SOLICITOR GENERAL CONCEDES THE CONFLICT AMONG THE CIRCUITS	1
THE COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO RECONCILE THE CONFLICT AMONG THE CIRCUITS	3
THE SECOND AND SEVENTH CIRCUITS' BAR TO PRESENTING INEFFECTIVENESS CLAIMS IN § 2255 PROCEEDINGS DEPRIVES THE DISTRICT COURTS OF AN OPPORTUNITY TO EVALUATE INEFFECTIVENESS CLAIMS	5
CONCLUSION	9

TABLE OF AUTHORITIES

	Page(s)
Cases:	
Billy-Eko v. United States, 8 F.3d 111 (2d Cir. 1993)	3
Commissioner of Internal Revenue v. Bilder, 369 U.S. 499 (1962)	3
Guinan v. United States, 6 F.3d 468 (7th Cir. 1993)	3, 5, 6
McMann v. Richardson, 397 U.S. 759 (1970)	2
Strickland v. Washington, 466 U.S. 668 (1984)	2, 6
Thomas v. Arn, 474 U.S. 140 (1985)	7
United States v. Cronic, 466 U.S. 648 (1984)	4
United States v. DeRewal, 10 F.3d 100 (3rd Cir. 1993), *cert. denied*, 511 U.S. 1033 (1994)	3
United States v. Galloway, 56 F.3d 1239 (10th Cir. 1995)	3, 5
Miscellaneous:	
John M. Burkoff & Hope L. Hudson, *Ineffective Assistance of Counsel* (Clark Boardman Callaghan) (1994)	3

THE SOLICITOR GENERAL CONCEDES THE CONFLICT AMONG THE CIRCUITS

The question presented is whether this Court should resolve the recurring and constitutionally important conflict among the Circuits as to when a criminal defendant must raise a Sixth Amendment challenge to the effectiveness of his trial counsel without risk of forfeiture.

Most Circuit courts recognize that 28 U.S.C. § 2255 provides a more efficient and effective means of resolving an ineffectiveness complaint. In fact, the Solicitor General concedes that the Second and Seventh Circuits stand alone in their stringent holding that a defendant, who is represented by new counsel on appeal, forfeits an ineffectiveness claim that was not raised on direct appeal. (Brief for Solicitor General at 9, 10 n.5.) But at the same time the Solicitor General reaffirms the government's long-standing position, which is in direct conflict with the Second and Seventh Circuits, that ineffectiveness claims *should* be litigated in a § 2255 proceeding rather than on direct appeal, without any showing of cause or prejudice. (Brief for Solicitor General at 10.)

Despite acknowledging a clear disagreement among the Circuits, the Solicitor General now contends that uniformity is not required because this question is treated as a "procedural rule." But even procedural rules are subject to this Court's supervisory power where they implicate a defendant's constitutional rights, or where the Circuits are divided over the application of such rules.

At issue is whether a criminal defendant can be deprived of his right to judicial review of a conviction that allegedly was obtained in violation of his Sixth Amendment right to effective assistance of counsel.[1] Uniformity among the courts of appeals *is* appropriate on this matter because ineffectiveness of trial counsel is *not* a procedural technicality.

In light of the Solicitor General's brief, it is evident that this Court is being asked to decide whether access to 28 U.S.C. § 2255 should be consistent throughout the nation. Put another way, should the ability to present a constitutional claim pursuant to § 2255 vary from Circuit to Circuit? It is a fact that § 2255 was enacted by Congress, and is not a local Circuit court rule.

Moreover, why should a defendant in New York be denied the right to assert an ineffectiveness claim that could result in the reversal of a life or death sentence, while defendants convicted in federal courts in New Jersey or Colorado are empowered to raise that constitutional complaint in a § 2255 proceeding? This is hardly "procedural." Certainly, under any uniform federal system, such drastic differences in due process, with such significant consequences, should not be left unresolved by this Court.

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[1] In *Strickland v. Washington*, 466 U.S. 668, 684 (1984), this Court confirmed that the Sixth Amendment right to counsel is needed in order to protect the fundamental right to a fair trial. Moreover, "the right to counsel is the right to the effective assistance of counsel." 466 U.S. at 686; *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

THE COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO RECONCILE THE CONFLICT AMONG THE CIRCUITS

Rule 10(a) provides that review by this Court may be granted where a "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Here, the Second and Seventh Circuit courts have entered decisions[2] that are in clear conflict with decisions of other Circuit courts.[3] In fact, the Solicitor General describes them as "competing rules." (Brief for Solicitor General at 11.)

The question of when the competency of counsel, under the Sixth Amendment to the United States Constitution, must be raised is an "important matter" of national interest and concern.[4] A uniform rule is required to govern the assertion of that claim which is of *constitutional* magnitude.

Rule 10(a) further provides that certiorari may be granted where a court of appeals has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned a departure by a lower court, as to call for an exercise of

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[2] *Massaro v. United States*, Pet. App. 3-10; *Billy-Eko v. United States*, 8 F.3d 111 (2d Cir. 1993); *Guinan v. United States*, 6 F.3d 468 (7th Cir. 1993).

[3] *See, e.g., United States v. DeRewal*, 10 F.3d 100, 101 (3rd Cir. 1993), *cert. denied*, 511 U.S. 1033 (1994); *United States v. Galloway*, 56 F.3d 1239 (10th Cir. 1995) (*en banc*).

[4] "Ineffective assistance of counsel is one of the most — if not *the* most — common appeal grounds asserted by convicted criminal defendants as appellants." John M. Burkoff & Hope L. Hudson, *Ineffective Assistance of Counsel* 1-3 (Clark Boardman Callaghan) (1994) (emphasis theirs).

This Court previously recognized the importance of granting certiorari to resolve a conflict among the Circuits, because of a "contrary holding by the Court of Appeals for the Second Circuit, and the need for a uniform rule on the point . . . to resolve the conflict." *Commissioner of Internal Revenue v. Bilder*, 369 U.S. 499, 501 (1962).

this Court's supervisory power." The creation of a bar to, or a forfeiture of, the presentation of constitutional claims in § 2255 proceedings constitutes a radical departure from the "accepted and usual course of judicial proceedings" whereby § 2255 motions are *the* proper and conventional way to challenge counsel's ineffectiveness. Even the Solicitor General agrees that the courts of appeals express a strong preference (or in some cases require) that ineffective assistance claims be presented to the district court, in the first instance, through a § 2255 motion. (Brief for Solicitor General at 9.)

These considerations must be balanced against the factors cited by the Solicitor General as "advantages" of the rule advocated by the Second and Seventh Circuits.[5] Each of these "competing" concerns underscores the need for this Court's resolution of these conflicting viewpoints.

The propositions of the Petitioner and countered by the Solicitor General all illustrate the serious questions that abound as to whether federal courts should follow (1) the Second and Seventh Circuits, (2) the other Circuits, or (3) the rule routinely suggested by the government.[6] This case fully qualifies for the exercise of this Court's supervisory power to impose some consistency and uniformity in this important area of controversy.

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[5] The Tenth Circuit's *en banc* decision in *United States v. Galloway*, contains a comprehensive discussion of the benefits and flaws of the various approaches to this significant question. 56 F.3d at 1240-42.

[6] *United States v. Cronic*, 466 U.S. 648, 666 n.42 (1984) ("[t]he Government argues that a defendant can attack the actual performance of trial counsel only through a petition for postconviction relief under 28 U.S.C. § 2255").

As recognized by Judge Easterbrook, of the Seventh Circuit, "[r]eview will come eventually, in light of the conflict and the Solicitor General's position."[7] Review should come now, *in this case involving a life sentence*, where no court has ever reviewed the merits of the Petitioner's Sixth Amendment claim.[8]

THE SECOND AND SEVENTH CIRCUITS' BAR TO PRESENTING INEFFECTIVENESS CLAIMS IN § 2255 PROCEEDINGS DEPRIVES THE DISTRICT COURTS OF AN OPPORTUNITY TO EVALUATE INEFFECTIVENESS CLAIMS

The approach embraced by the government, as well as most Circuits, "ensures that the district court has an opportunity to pass on all ineffectiveness claims under 28 U.S.C. 2255 before their presentation to an appellate court." (Brief for Solicitor General at 12.) The Tenth Circuit calls the reasons for this rule "self-evident," stating that a "factual record must be developed in and addressed by the district court in the first instance for effective review."[9]

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[7] *Guinan v. United States*, 6 F.3d 468, 476 (7th Cir. 1993) (Easterbrook, J., concurring).

[8] The Solicitor General contends, "this Court has repeatedly declined to grant review in similar cases presenting the same issue." (Brief for Solicitor General at 12-13.) However, the fact that defendants from the Second and Seventh Circuits continue to seek sanctuary in this Court only emphasizes the extent of this problem. Moreover, the cases cited by the Solicitor General are readily distinguishable from the instant case and do not involve a defendant serving a life sentence. *Sprecher v. United States*, No. 95-82 (37 months imprisonment); *Moghal v. United States*, No. 95-9027 (60 months imprisonment); *Velasquez v. United States*, No. 95-6925 (121 months imprisonment).

[9] *Galloway*, 56 F.3d at 1240.

In stark contrast, the Second and Seventh Circuits obligate a newly engaged appellate attorney to present *all* potential ineffectiveness claims on direct appeal, regardless of whether they were fully resolved on the record, to ensure that the issues are not procedurally barred or waived.[10] Such an approach then compels the court of appeals to evaluate whether the issue was sufficiently developed on the record to merit review, or whether the ineffectiveness question requires further development before the district court.

This cumbersome approach actually deprives district courts of a chance to evaluate and rule on certain ineffectiveness claims. However, in *Strickland v. Washington*, 466 U.S. 668, 689 (1984), this Court confirmed that a court deciding an ineffectiveness claim must determine whether, in light of all the circumstances, counsel's acts or omissions were outside the wide range of competent counsel. The district court, which is in a better position to evaluate any hearing testimony,[11] should not be deprived of that opportunity.[12]

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[10] Appellate counsel in the Second Circuit must now present any possible ineffectiveness claim on direct appeal because there is no way to tell whether the Second Circuit will find that the record was fully developed. In the current case there was never any hearing on the issue. Defense counsel was never called upon to explain or justify his failings. This was also not the subject of a motion pursuant to Rule 33 of the Federal Rules of Criminal Procedure. And yet, it was found to be fully developed on the record, and the Defendant was barred from raising it in a § 2255 motion.

The Second Circuit ruled that new appellate counsel should have raised the Petitioner's ineffective assistance complaint on direct appeal because the claim was based "solely on the record adduced at trial." (Pet. App. 7.) But since the ineffectiveness claim relates to the trial lawyer's failure to conduct a proper investigation, how can those failings ever be sufficiently developed on the trial record without a hearing or further exploration? Indeed, it is highly unrealistic to expect or insist that trial counsel take pains to develop a full record of his or her own ineffectiveness.

[11] The "trial judge is best situated to assess overall performance and prejudice, yet a claim of ineffective assistance presented on direct appeal asks the court of appeals to act without the district judge's views." *Guinan v. United States*, 6 F.3d at 473 (Easterbrook, J., concurring).

The continuing rivalry that exists in the Circuits over such an important issue as the effective assistance of counsel, which goes to the very heart of our system of justice, is intolerable. In the United States, the right to challenge the constitutionality of a conviction, based upon a Sixth Amendment violation, must be the same for all. Otherwise, that right is rendered conditional for many. And, a conditional right, heavily encumbered by unbearable and unrealistic preservation requirements, is no right at all. Local or parochial preferences of the Second and Seventh Circuits must yield to the superior force of a national rule that lends stability and certainty to an area of growing constitutional litigation.

Joseph Massaro, a citizen of the United States, is suffering a life sentence of imprisonment for a crime he has always maintained he did not commit. But, just as important is his unqualified assertion that the effective assistance of a lawyer could have saved him from such an unjust conviction.[13]

---

[12] This Court's decision in *Thomas v. Arn*, 474 U.S. 140 (1985), fully illuminates the incongruity of forcing new appellate counsel, on the direct appeal from a criminal conviction, to raise a claim of ineffective trial counsel that was not raised before or decided by the trial court. In *Thomas*, this Court condemned any procedure that "would either force the court of appeals to consider claims that were never reviewed by the district court, or force the district court to review every issue in every case," even if an issue had not been raised or litigated in the district court. Such a result "would be an inefficient use of judicial resources." 474 U.S. at 148.

[13] We must not lose sight of the ineffectiveness claim in this case. In the midst of Joseph Massaro's murder trial the prosecution suddenly produced a bullet that was mysteriously discovered three years after the murder in a car that the police had thoroughly searched on several occasions. The trial judge "repeatedly encouraged" defense counsel to accept an adjournment of the proceedings so that a proper investigation of this new evidence could be performed. Counsel failed to accept any continuance and had only the hastiest investigation conducted of *the* key

What is even worse, Joseph Massaro was never afforded his day in court concerning this constitutional claim, simply because he was on the wrong side of the significant divide that has opened in the Circuits over this question. Only this Court can now determine if Joseph Massaro should have the right to litigate this ineffectiveness claim in the same way as criminal defendants in all but the Second and Seventh Circuits.[14]

---

piece of evidence. Counsel even failed to request a copy of the video-taped re-enactment of the suspicious discovery of the bullet. Once his motion for a mistrial had been denied, trial counsel continued with the same strategy that he advanced in his opening statement, with barely any consideration given to the shocking revelation of the bullet evidence.

[14] For unexplained reasons, Judge Cedarbaum took three and a half years to rule, on the §2255 motion, that the Petitioner was procedurally barred from raising the ineffectiveness claim. The murder occurred in 1990. The trial was in 1993. The conviction was affirmed in 1995, and it took until November 29, 2000 for Judge Cedarbaum to hold that the court would not review his ineffectiveness claim.

CONCLUSION

For all the foregoing reasons, as well as those raised in the original petition, Petitioner prays that a writ of certiorari issue to review the Second Circuit's opinion in this case.

Dated: July 18, 2002

Respectfully submitted,

HERALD PRICE FAHRINGER
Counsel of Record
ERICA T. DUBNO
LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY
& CAMBRIA LLP
780 Third Avenue
New York, NY 10017
(212) 319-5351

Counsel for Petitioner

Of Counsel:
EUGENE GRESSMAN
Univ. of North Carolina
School of Law
Chapel Hill, NC 27599
(919) 962-3688

(4)

Supreme Court, U.S.
FILED
NOV 14 2002

No. 01-1559

In the

Supreme Court of the United States

JOSEPH MASSARO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOINT APPENDIX

THEODORE B. OLSON
Solicitor General of the
United States
Department of Justice
950 Pennsylvania Avenue,
N.W.
Washington, DC 20530
(202) 514-2203

Counsel for Respondent

HERALD PRICE FAHRINGER
Counsel of Record
ERICA T. DUBNO
LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY
& CAMBRIA LLP
780 Third Avenue, 32nd Floor
New York, NY 10017
(212) 319-5351

Counsel for Petitioner

Of Counsel:
EUGENE GRESSMAN
Univ. of North Carolina
School of Law
Campus Box #3380
Chapel Hill, NC 27599
(919) 962-3688

PETITION FOR CERTIORARI FILED APRIL 15, 2002
CERTIORARI GRANTED OCTOBER 1, 2002

195 pp
$ 1.10

TABLE OF CONTENTS

	Page
Civil Docket Entries of the United States District Court for the Southern District of New York	1
Docket Entries of the United States Court of Appeals for the Second Circuit	4
United States v. Massaro, Excerpts from the Transcript of Trial before the United States District Court for the Southern District of New York, Dated September 28, 1993	14
United States v. Massaro, Excerpts from the Transcript of Trial before the United States District Court for the Southern District of New York, Dated October 4, 1993	28
United States v. Massaro, Excerpts from the Transcript of Trial before the United States District Court for the Southern District of New York, Dated October 6, 1993	72
Exhibits in Support of Motion to Vacate the Judgment of Sentence Pursuant to 28 U.S.C. § 2255, Dated April 24, 1997:	
United States v. Massaro, Transcript of Oral Argument of Direct Appeal before the Second Circuit, Dated April 20, 1995	118
Affidavit of Robert J. Kopec, Dated March 21, 1997	143
Affidavit of Rene J. Trasorras, Dated March 18, 1997	161
Affidavit of Charles V. Morton	164

Letter to Defense Counsel, Dated September 11, 1993 176

Letter to Defense Counsel, Dated September 24, 1993 178

Letters to David Kelley, Dated July 25, 1996, August 8, 1996 and October 2, 1996 180

Affidavit of Eric Kuske 186

The following orders and opinions have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Order of the United States Court of Appeals for the Second Circuit, Dated January 14, 2002, Denying Petitioner's "Petition for Rehearing and Suggestion for Rehearing *En Banc*" A-1

"Summary Order" of the United States Court of Appeals for the Second Circuit, Dated November 2, 2001, Affirming a District Court Order that Denied Petitioner's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2255 ..... A-3

Memorandum Opinion and Order of the United States District Court for the Southern District of New York, Dated May 11, 1998, of Judge Miriam Goldman Cedarbaum, Ruling that the 28 U.S.C. § 2255 Motion was Timely, and the Motion for a New Trial was Timely in Part and Untimely in Part A-11

Opinion of the United States District Court for the Southern District of New York, Dated November 29, 2000, of Judge Miriam Goldman Cedarbaum, Denying Both the Motion for a New Trial and the 28 U.S.C. § 2255 Application A-16

Order of the United States District Court for the Southern District of New York, Dated December 26, 2000, of Judge Miriam Goldman Cedarbaum, Granting a Certificate of Appealability A-27

Order of the United States Court of Appeals for the Second Circuit, Dated March 14, 2001, Enlarging the Certificate of Appealability A-28

Order of the United States Court of Appeals for the Second Circuit, Dated May 18, 1995, Affirming Petitioner's Conviction of Murder and Life Sentence A-30

Docket as of November 13, 2002 2:08 pm
CLOSED

Proceedings include all events.
1:97cv2971 Massaro v. USA

U.S. District Court
Southern District of New York - Civil Database
(Foley Square)

CIVIL DOCKET FOR CASE #: 97-CV-2971
Massaro v. USA Filed: 04/24/97

Assigned to: Judge Miriam Goldman Cedarbaum
Demand: $0,000 Nature of Suit: 510
Lead Docket: None Jurisdiction: US Defendant
Dkt# in other court: None
Cause: 28:2255 Motion to Vacate Sentence

JOSEPH MASSARO HERALD PRICE FAHRINGER
petitioner [COR LD NTC]

LIPSITZ, GREEN, FAHRINGER, ROLL, SALISBURY & CAMBRIA

110 EAST 59TH AVENUE
28TH FLOOR
NEW YORK, NY 10022
212-909-9670

v.

UNITED STATES OF AMERICA
respondent

4/24/97 1 NOTICE OF MOTION by Joseph Massaro to vacate under 28 U.S.C. 2255; No further entries. See criminal docket # 92 Cr 529 (MGC) . (sac) [Entry date 04/25/97]

4/24/97 -- Magistrate Judge Pitman is so Designated. (sac) [Entry date 04/25/97]

4/24/97 2 MEMORANDUM OF LAW by Joseph Massaro in support of [1-1] motion to vacate under 28 U.S.C. 2255 (sac) [Entry date 04/25/97]

11/29/00 -- OPINION #84852, denying [1-1] motion to vacate under 28 U.S.C. 2255 and the motion for a new trial. (signed by Judge Miriam Goldman Cedarbaum); Copies mailed. (orig. doc. filed in the criminal case no. S1 92 Cr. 529, as doc. #150) (ae) [Entry date 11/30/00] [Edit date 11/30/00]

11/29/00 -- Case closed. (ae) [Entry date 11/30/00]

12/8/00 -- NOTICE OF APPEAL by Joseph Massaro; from [0-1] order. Copies of notice of appeal mailed to Attorney(s) of Record: A.U.S.A., David N. Kelley, Esq. $105.00 Appeal filing fee paid 12/7/00 on receipt # E 391844. *(Original Doc. # 151 Filed In 92 Cr. 525-04)*. (dt)

12/8/00 -- Notice of appeal and certified copy of docket to USCA: [0-1] appeal by Joseph Massaro; Copy of notice of appeal sent to District Judge. (dt)

12/27/00 3 CERTIFICATE OF APPEALABILITY, Joseph Massaro has requested that I issue a certificate of appealability to enable him to appeal my recent decision denying his motion purs. to 28 U.S.C. sec. 2255. A certificate of appealability can only issue if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. sec. 2253(c)(2). (signed by Judge Miriam Goldman Cedarbaum); Copies mailed. (ae) [Entry date 12/28/00]

1/18/01 -- Notice that the record on appeal has been certified and transmitted to the U.S. Court of Appeals: [0-1] appeal by Joseph Massaro.

(Original Doc. #153 Filed In 92 Cr. 529-04). (dt)

1/18/01 -- Indexed record on appeal files (00-2720) sent to the U.S.C.A. (dt) [Edit date 01/18/01]

2/5/02 -- MANDATE OF USCA (certified copy) Re: affirm [0-1] appeal by Joseph Massaro. It is hereby ordered, adjudged and decreed that the judgment of the District Court is hereby affirmed. Issued as Mandate: 1/28/02, 00-2720 Roseann B. MacKechnie, Clerk, U.S.C.A. *(Original document # 156 filed in 92 cr 529)*. (sb) [Entry date 02/06/02]

2/5/02 -- MANDATE OF USCA (certified copy) Re: [0-1] appeal by Joseph Massaro. It is ordered that said petition for rehearing is denied. Issued as Mandate: 1/28/02, 00-2720 Roseann B. MacKechnie, Clerk, U.S.C.A. *(Original document # 157 filed in 92 cr 529)*. (sb) [Entry date 02/11/02]

3/19/02 -- Record on appeal files (00-2720) returned from U.S. Court of Appeals: [0-1] appeal by Joseph Massaro. (dt)

INDIV HEARD
CLOSED C10593
H05 2 N

Proceedings include all events. 00-2720 Massaro v. USA
GENERAL DOCKET FOR Second Circuit Court of Appeals
Court of Appeals Docket #: 00-2720 Filed: 12/13/00
Nsuit: 2510 PRISONER PET-Sentence (2255)
Massaro v. USA
Appeal from: U.S. District Court SDNY

- -

Case type information:

1) Prisoner Petition
2) Federal
3) 2255

- -

Lower court information:
District: 0208-01: 97-cv-2971
Trial Judge: Miriam Goldman Cedarbaum
Date Filed: 12/8/97
Date order/judgment: 11/29/00
Date NOA filed: 12/7/00

- -

Fee status: paid

- -

Prior cases:
None

Current cases:
None

- -

Panel Assignment:

Panel: CJS RAK FJM 1705: CA2 10/3/01 am
Date of decision: 10/3/01

- -

JOSEPH MASSARO Herald Price Fahringer, Esq.
Petitioner-Appellant 212-319-5351
32nd floor
[COR LD NTC ret]
Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria
780 3rd Ave.
New York, NY 10017-1304

v.

UNITED STATES OF AMERICA David Kelley, Esq.
Respondent - Appellee 212-637-1025
[COR LD NTC ret]
U.S. Attorney's Office
Southern District of New York
1 St. Andrews Plaza
Att: Brenda Lewis, Legal Secretary
New York, NY 10007

Official Caption 1/
Docket No. [s]: 00-2720

JOSEPH MASSARO,

Petitioner-Appellant,

V.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Authorized Abbreviated Caption 2/

Docket No. [s]: 00-2720

MASSARO V. USA

1/ Fed. R. App. P. Rule 12 [a] and 32 [a]

2/ For use on correspondence and motions only

12/13/00	Copy of notice of appeal and district court docket entries on behalf of Appellant Joseph Massaro filed. (NOCOA fed - 2255; fee pd) [00-2720] (pr25)
12/13/00	Copy of U.S. District Court Opinion dated November 29, 2000 filed. (pr25)
12/13/00	Copy of receipt re: payment of docketing fee filed on behalf of Appellant Joseph Massaro receipt #: E391844. [00-2720] (pr25)
12/13/00	Appellant Joseph Massaro Form C filed, with proof of service. [00-2720] (pr25)
12/13/00	Appellant Joseph Massaro Form D filed, with proof of service. [00-2720] (pr25)
12/13/00	SEE: 94-1447. (pr25)
12/15/00	Order dismissing appeal without prejudice to the appeal being reinstated upon notice to the Clerk within 30 days from the entry of an order by the dc judge granting or denying a certificate of appealability filed. (pr25)
12/15/00	Certified copy of order dated 12/15/00 disposing of the appeal issued to district court. (pr25)
12/15/00	Notice to counsels of order filed 12/15/00. (pr25)
1/11/01	Copy of district court order granting coa filed. (pr25)
1/11/01	Notice of reinstatement on behalf of Joseph Massaro [Code: P Reopened: 1/11/01] (pr25)
1/12/01	Certificate of Appealability scheduling order #1 filed. Record on appeal due on 1/29/01. Appellant's brief and appendix due on 2/12/01.

	Appellee's brief due on 3/13/01. Argument as early as week of 4/25/01. (pr25)
1/12/01	Notice to counsels of scheduling order filed 1/12/01. (pr25)
1/18/01	Record on appeal index received. (pr25)
1/18/01	Record on appeal filed. (Original papers of district court.) (pr25)
1/18/01	Record on appeal index received. (pr25)
1/19/01	Letter sent to Appellant Joseph Massaro, Appellee USA: informing parties that the record on appeal has been filed with this Court. (pr25)
2/12/01	Appellant Joseph Massaro motion to extend time to file brief, to allow expand COA FILED (w/pfs). [1792329-2] (pr25)
2/15/01	Order FILED GRANTING motion for extended time [1792329-1] by Appellant Joseph Massaro, endorsed on motion form dated 2/12/01. Extended appellant's brief due date is 4/20/01. Extended appellee's brief due date is 5/21/01. Extended argument week as early as 7/2/01. (BJM) (pr25)
2/15/01	Notice to counsels of order filed 2/15/01. (pr25)
2/28/01	Appellee USA affidavit in opposition to the pending motion to enlarge the COA filed (w/pfs). (pr21)
3/14/01	Appellant has filed a motion to expand the certificate of appealability issued by the district court. Upon due consideration, it is ORDERED that the motion is granted to the extent that the certificate of appealability is expanded to include the following issue: whether the district court correctly found that appellant's claim that his

trial counsel acted ineffectively when he refused to allow appellant to testify was procedurally barred based on appellant's failure to raise the claim on direct appeal. See Billy-Elko v. United States, 8 F.3d 111, 114 (2d Cir. 1993). The parties are advised that the Court recently granted a certificate of appealability and heard argument on the following issue which is directly relevant to this case: whether the district court correctly found that a habeas petitioner must do more than merely make a bare allegation that his trial counsel ineffectively refused to allow him to testify in order to successfully attack his conviction. See Chang v. United States, USCA dkt. no. 99-2471; see also Underwood v. Clark, 939 F.2d 472 (7th Cir. 1991); United States v. McMeans, 927 F.2d 163 (4th Cir. 1991); United States v. Martinez, 883 F.2d 750 (9th Cir. 1989);Siciliano v. Voss, 834 F.2d 29 (1st Cir. 1987). In all other respects appellant's motion is denied. See Barber v. Scully, 731 F.2d 1073, 1075 (2d Cir. 1984). Appellant has not made a substantial showing of the denial of a constitutional right" with regard to the remaining issues on which the district court declined to grant a certificate of appealability. 28 U.S.C. & 2253(c). (By: LC)(Before: JMcL, SS, Bertelsman) (pr25)

3/14/01 Certified copy of the order of 3/14/01 issued to the district court. (pr25)

3/14/01 Notice to counsels of order filed 3/14/01. (pr25)

4/17/01 Appellant Joseph Massaro motion to extend time to file brief, to file late FILED (w/pfs). [1832349-2] (pr25)

4/27/01 Order FILED GRANTING motion for extended time [1832349-1] by Appellant Joseph Massaro, endorsed on motion form dated 4/17/01. Extended appellant's brief due date is 6/11/01. Extended appellee's brief due date is 7/13/01. Extended argument week as early as 9/4/01. (By: LG), GRANTING motion to file late [1832349-2] by Appellant Joseph Massaro, endorsed on motion form dated 4/17/01. (pr25)

4/27/01 Notice to counsels of order filed 4/27/01. (pr25)

6/11/01 Appellant Joseph Massaro motion to extend time to file brief FILED (w/pfs). [1869446-1] (pr25)

6/13/01 Order FILED GRANTING motion for extended time [1869446-1] by Appellant Joseph Massaro, endorsed on motion form dated 6/11/01. Extended appellant's brief due date is 6/18/01. Extended appellee's brief due date is 7/18/01. Extended argument week as early as 9/4/01.(LG) (pr25)

6/13/01 Notice to counsels of order filed 6/13/01. (pr25)

6/18/01 Notice of appearance form on behalf of Herald Price Fahringer, Esq., received. (Orig. to Calendar) (pr25)

6/18/01 Appellant Joseph Massaro brief FILED with proof of service.(shelf #59) (pr25)

6/18/01 Appellant Joseph Massaro appendix filed w/pfs. (pr25)

7/18/01 Appellee USA motion to extend time to file brief FILED (w/pfs). [1894685-1] (pr25)

7/18/01 Order FILED GRANTING motion for extended time [1894685-1] by Appellee USA, endorsed on motion form dated 7/18/01. Extended appellee's

	brief due date is 7/20/01. Extended argument week as early as 9/4/01. (LG) (pr25)
7/20/01	Notice to counsels of order filed 7/18/01. (pr25)
7/20/01	Appellee USA motion for leave to file oversized brief FILED (w/pfs). [1897694-1] (pr25)
7/20/01	Appellee USA brief RECEIVED. Problem: motion for oversized brief pending. (pr25)
7/26/01	Order FILED GRANTING motion for leave to file oversized brief [1897694-1] by Appellee USA, endorsed on motion form dated 7/20/01. (LG) (pr25)
7/26/01	Appellee USA brief filed with proof of service. (pr25)
7/30/01	Appellant Joseph Massaro motion to extend time to file brief FILED (w/pfs). [1902131-1] (pr25)
7/30/01	Proposed for argument the week of 10/1/01. (ca96)
7/31/01	Order FILED GRANTING motion for extended time [1902131-1] by Appellant Joseph Massaro, endorsed on motion form dated 7/30/01. It is hereby ordered that any reply brief shall be filed on or before Sept. 17th, 2001. Extended argument week as early as 10/1/01. (For the Court by LG/SC). (pr29)
7/31/01	Notice to counsel re: Motion order extending time to file a reply brief on or before 9/17/01. (pr29)
8/10/01	Set for argument on 10/3/01 . [00-2720] (ca91)
9/20/01	Appellant Joseph Massaro motion to extend time to file reply brief FILED (w/pfs). [1930096-1] (pr25)

9/27/01	Appellant Joseph Massaro reply brief received. Problem: motion pending. (pr25)
10/3/01	Case heard before STRAUB, KATZMANN, MAGILL C.JJ. (TAPE: #25) (ca95)
10/3/01	Order FILED GRANTING motion to extend time to file appellant's reply brief and leave to file out of time [1930096-1] by Appellant Joseph Massaro, endorsed on motion form dated 9/20/01(FOR THE COURT-AV). (ca91)
10/10/01	Letter received from C. LaPlaca requested an oral argument tape. (receipt #164081) (Forwarded to Calendar) (rev)
10/11/01	Appellant Joseph Massaro reply brief filed with proof of service. (ca91)
10/11/01	Letter received from E. Dubno requesting an oral argument tape. (receipt #164101) (Forwarded to Calendar) (rev)
10/15/01	Oral argument tape mailed to C. LaPlaca. (ca95)
10/15/01	Oral argument tape mailed to Herald Price Fahringer for Appellant Joseph Massaro. (ca95)
11/2/01	Judgment filed; judgment of the district court is AFFIRMED by detailed order of the court without opinion filed. (CJS, C.J.J.) [Entry Date: 11/2/01] (pr21)
11/2/01	Notice to all parties of the Summary Order filed 11/2/01. (pr21)
11/5/01	Letter received from law firm Lipsitz, Green, Fahringer, informing the court of its address change. (pr25)
11/7/01	Request for address/phone change sent to systems. (pr25)

11/15/01 Request for address/phone change sent to systems. (pr25)

11/15/01 Appellant Joseph Massaro motion to extend time to file petition for rehearing FILED (w/pfs). [1965407-1] (pr25)

11/20/01 Order FILED GRANTING motion for extended time [1965407-1] by Appellant Joseph Massaro, endorsed on motion form dated 11/15/01. (Petition for rehearing due 12/3/01.) (By: AH) (Before: CJS, RAK, Magill) (pr25)

11/21/01 Notice to counsels of order filed 11/19/01. (pr25)

12/3/01 Appellant Joseph Massaro petition for rehearing en banc [1974802-1] with proof of service filed. (pr25)

1/14/02 Order FILED DENYING petition for rehearing in banc [1974802-1] by Appellant Joseph Massaro. (AH) (pr25)

1/14/02 Notice to counsels of order filed 1/14/2. (pr25)

1/28/02 Judgment MANDATE ISSUED. (pr20)

1/28/02 Notice to all parties of Summary Order mandated 1/28/02 filed. (pr20)

1/29/02 Acco received in records room from team. (rer)

2/6/02 Mandate receipt returned from the district court. (rer)

2/13/02 Mandate receipt returned from the district court. (rer)

3/15/02 Record on appeal RETURNED to lower court. No. of volumes: 7 (reg)

4/26/02 Notice of filing petition for writ of certiorari for Appellant Joseph Massaro dated 4/23/2 filed. Supreme Ct#: 01-1559. (pr25)

10/8/02 Certified copy of Supreme Court order GRANTING petition for writ of certiorari [2070742-1] by Appellant Joseph Massaro, dated 10/1/2. (pr25)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

JOSEPH MASSARO, a/k/a
"Joey Bang Bang,"
"Joey Bank," and
JOSEPH KERN, a/k/a "Joey K,"

Defendants.

S1 92 Cr. 529
(MGC)

September 28, 1993
10:04 a.m.

Before:

HON. MIRIAM GOLDMAN CEDARBAUM,
District Judge

APPEARANCES

MARY JO WHITE
United States Attorney for the
Southern District of New York
DAVID KELLEY
RANDALL BODNER
Assistant United States Attorneys

-and-

AVRIL FUGGER
Paralegal

HARRY BATCHELDER
BRAD LEVENTHAL
Attorneys for defendant Massaro

MR. BODNER: I understand. I will look in our files. However, that doesn't detract from the fact he said it.

THE COURT: It is not a matter of detracting. It might help me to understand exactly what happened here. I think one could argue that all that Serrano meant to this lawyer was a reduced charge, from the language that he used.

MR. BODNER: Exactly.

THE COURT: I understand.

On the other hand, that's not what Serrano means. So it is not a clear record. Obviously, it would be ideal if the admission were clearer. Very few things in life are perfect.

MR. BODNER: But, Judge, I guess the—

THE COURT: We are laboring this. We understand each other.

MR. BATCHELDER: The second application I have, your Honor, is one that I do with a great deal of reluctance. I have spoken with my co-counsel.

Here is what happened. Your Honor, you may remember when we opened in this case we took a position that there was absolutely no scientific evidence, when in fact a fair part of the opening was devoted to Joseph Fiorito's murder and the fact

there was no scientific evidence whatsoever to bring Mr. Massaro to that.

[1987]

THE COURT: Now you have a bullet.

MR. BATCHELDER: Now we have a problem. I'm not saying whose fault it is. I'm not doing anything. I'm simply saying that approximately two weeks ago we find out that a bullet has been located.

THE COURT: I don't want to interrupt you, but it seems to me this all should have been aired yesterday when we didn't have a jury. Now we have the jury.

MR. BATCHELDER: We went home and thought about it because when we got today — we got the report fully. If I can — I'm not sure Mr. Kelley has given a copy to you, your Honor.

THE COURT: Thank you.

MR. BATCHELDER: The problem we have, your Honor, is that we proposed a defense based on what we knew at that time.

Ten days ago or maybe two weeks ago or more we get the first inclination there is a bullet. You have the correspondence in front of you. It became a torrent of correspondence. Three more letters hit our desk over the weekend and just before.

Your Honor, we are in a position hereof starting out — and I don't wish to mix my metaphors. As Judge Lombard once said, we started out playing basketball and now all of a sudden as we are going into the arena we are

[1988]

playing ice hockey.

It is very difficult. I'm not faulting the government. I should, but I can't. They say that they found out about this as a result of some person coming to the FBI with a bullet while they are fooling around with the car. That may or may not be so. I don't know.

I do find myself in the position of, our credibility, if it is not shot, the shift has had a 45 degree list and we have three torpedoes amidships. I don't know how we can come away from this and I have never been in a situation like this.

THE COURT: One thing, I can direct the government not to refer to that part of your opening on the closing.

MR. BATCHELDER: The cat is out of the bag. I stood there and that was the forceful part of our opening. Mr. Leventhal and I sat down. We went over the opening and our whole theory on cross-examining the Crime Scene people, in cross-examining the Medical

Examiner person, it was all directed to the fact that you never recovered a bullet. You never recovered anything. You may remember that line of examination. Our theory was that it happened somewhere else or it surely didn't happen the way he said it happened.

Now there is supposedly, as I understand it, there is this bullet found behind the driver's seat floor

[1989]

part.

Why we are taking the position that — you know our position about the shooting. There is no big secret about that.

THE COURT: What is your position about the shooting? I know you have tried very hard to undermine the testimony of Esposito, but I thought that was because you wanted to undermine his credibility and his testimony that your client was with him.

MR. BATCHELDER: Absolutely. No question about that. But you may remember our approach with the Medical Examiner person, your Honor, Dr. Lee.

Our approach on that one was posited on the fact, you may remember her first day's testimony about you can't say which one

happened first, which one happened second.

It comes back that the exit wound is the one that happened second. This was our theory. And our whole theory when we talked to the people who came before her, or examined the people before her, was that it never happened in the car.

Now they say, they come to us and say, hey, wait a minute. Time out. Not only is the shell casing found there, but now the fragments match up.

THE COURT: It is much more incriminating if the jury believes your client was in the car. I thought your

[1990]

whole position was he wasn't there.

MR. BATCHELDER: Our position was, too, he wasn't there, and it didn't happen the way Mr. Esposito said it happened. It was a two-pronged approach. It wasn't a straddle approach. I talked to Mr. Leventhal about that.

THE COURT: What is your application?

MR. BATCHELDER: I want a mistrial, your Honor. It will break me to do this. It is going to virtually bankrupt me if I have to try this case again, but I have no option.

THE COURT: What will a mistrial do?

MR. BATCHELDER: I have to start all over again concerning the technical information we have there so we can make a reasonable defense. If it is defensible. And I mean, to have us scrambling, and we have managed to locate one, but to have us scrambling for a ballistics expert two weeks before we end this case to try to come up with something after we have posited this whole approach, I just don't think it is fair, your Honor, most respectfully. I don't think it is fair.

THE COURT: Would you like a continuance?

MR. BATCHELDER: A continuance won't do me any good. If I thought I could get a continuance for 48 hours or 62 hours or next week, it wouldn't do me any good because the whole thrust of the defense was posited — you can see

[1991]

it. You have seen it. We started out with he got no connection with this.

And then the second part of it is, it didn't happen the way they said it happened. And therefore —

THE COURT: One is clearly a major position. Two is a fallback.

MR. BATCHELDER: No, two, we think, Mr. Leventhal and I believe — we think about 50-50, and that's what we talked about. We believe that the scientific

evidence that we had when we started this case, your Honor, when we started this case, supported that position probably better than the other one. The general credibility attack on Mr. Esposito, but the scientific —

THE COURT: What scientific evidence do you have?

MR. BATCHELDER: That there was no indication of an exit. There was no indication of anything on the seat. There was no bullet recovered —

THE COURT: When did you believe there was no indication of an exit?

MR. BATCHELDER: There is no skin. No bone. There is nothing in that car.

THE COURT: You are talking about the automobile?

MR. BATCHELDER: Yes. Therefore, without giving it all away, I will say that our theory was that it didn't happen in that car. And the second shot never happened in

[1992]

the car.

MR. KELLEY: Your Honor, the shell casing is right there. obviously, that is not dispositive. What happened was we later learned of this bullet and had made the comparison, as the record is clear.

Mr. Batchelder opened on page 42 of the transcript and told the jury that there was no scientific evidence that points directly to the defendant. That still is the case.

What is the case now is that, yes, there is nothing scientific that points to the defendant, but yes, we have the shell casing that was in the car that now matches to a bullet that was also found in the car. The exit wound was always present. The fragments were always present.

The question was, what order and where did it take place?

Obviously, they were going to argue that it either didn't take place in the car or it didn't take place in the car at all, despite the fact that there was blood in the car and despite the fact there was already a shell casing there and an exit wound.

THE COURT: I understand. I understand what you are saying. You are saying this evidence tends to corroborate the testimony about what happened in the car.

MR. BATCHELDER: Your Honor, I would think, and I

[1993]

have the utmost respect for Mr. Kelley, but his statement about no scientific evidence was the understatement of the year.

Your Honor, we might be able to live with the shell casing, that's fine.

THE COURT: You started with the shell casing.

MR. BATCHELDER: I said we might be able to live with the shell casing.

Now, your Honor, with respect to not only corroborative — and again I say, I have the utmost respect for Mr. Kelley. Flip the coin and you are standing there as a prosecutor and you find a bullet hole in the back seat, with the fragments which we just got that matchup with exactly the same shell, and to say that that isn't the queen of evidence is to ignore reality.

THE COURT: That's not what we started with. What we started with was whether that totally destroys your opening to the jury.

MR. BATCHELDER: It is not just the opening, your Honor. It is the way we tried the case. It is the way we examined — the opening is just one element of it. It's the way we examined the doctor with respect to the exit wound. It's the way we examined the Crime Scene people. We examined the Crime Scene people, and you may recollect Mr. Leventhal standing there and saying, hey, did you see any

[1994]

bone? Did you see any blood on that back seat? Did you see anything along those lines?

No. No. No.

Now somebody is going to come in And they have an easy fallback. The Crime Scene person says, we just fluffed it. We blew it. Thank you very much and goodbye. That ends our defense on the Crime Scene people.

THE COURT: Look, I'm sure you will argue to the jury, and this is the bullet, and why did it take them four years to find it.

MR. BATCHELDER: You can argue that until doomsday, but that doesn't take away from the grievous impact to the way we structured this case.

THE COURT: In any event, I can't prolong this. I will give you a reasonable adjournment if it will help you to get your expert scientific evidence, but I cannot grant a mistrial.

MR. BATCHELDER: Your Honor, —

THE COURT: You don't justify a mistrial by what has happened.

MR. BATCHELDER: What our expert says will do us no good. Most respectfully, assuming the expert confirms —

THE COURT: I assume your expert will help you work out some theory.

MR. BATCHELDER: No, no. No, no. The ballistic

[1995]

expert, most respectfully, your Honor, is going to be hired and work, indeed, in the same office. Will come in and probably say, I assume, that the shells match up.

THE COURT: Why don't you talk to him first. You have no idea —

MR. BATCHELDER: Let's assume that. What I can't get over, your Honor, I can't get over, no matter if you gave me six months, is the fact that we have posited a defense on the fact that there was no shell or anything recovered. No bullet recovered in that car and that the shot that took place in that car, which the government said didn't take place.

Now, through no fault of ours, three years later, somebody says, wait a minute. We better go back and do this, when we are in the middle of the trial.

I think the least you should do is preclude that evidence, if you won't give me the mistrial. It is not our fault. I don't do this lightly because this is going to be a financial disaster for me if I have to try this case again, but that's not your concern. I don't do this lightly. I sat there and Mr. Leventhal and I went over this last

night at length in any way trying to repair it. We can't.

THE COURT: It is an unusual occurrence.

MR. BATCHELDER: Unusual? Again, your Honor, I

[1996]

have ran this not through two lawyers but through two lay persons just to see —

THE COURT: Let's continue this at the noon recess. I want to get the jury.

MR. KELLEY: Your Honor, one last thing. I had delivered to chambers today a letter concerning our arguments yesterday.

THE COURT: I have not had an opportunity to read it. You can't just put it in the slot and expect it to come out.

MR. KELLEY: I was trying to confirm that you had received it.

THE COURT: I did receive that letter.

MR. BATCHELDER: Your Honor, that letter was handed to me ten minutes before I walked in. I haven't had a chance to look at it.

THE COURT: Let's get the jury in.

STANLEY NANKOF, resumed.

(Jury present)

THE COURT: Good morning, members of the jury.

THE JURY: Good morning.

THE COURT: Try as we may, we can't entirely avoid legal issues. We try very hard

not to dispute them or your time, but sometimes we can't help it.

You may proceed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

JOSEPH MASSARO, a/k/a
"Joey Bang Bang,"
"Joey Bank," and
JOSEPH KERN, a/k/a "Joey K,"

Defendants.

S1 92 Cr. 529
(MGC)

New York, N.Y.
October 4, 1993
10:30 a.m.

Before:

HON. MIRIAM GOLDMAN CEDARBAUM,

District Judge
and a Jury

APPEARANCES

MARY JO WHITE
United States Attorney for the
Southern District of New York
DAVID KELLEY
RANDALL BODNER
Assistant United States Attorneys

-and-

AVRIL FUGGER
Paralegal

HARRY BATCHELDER
BRAD LEVENTHAL
Attorneys for defendant Massaro

[2882]

MR. LEVENTHAL: Nothing further.

MR. KELLEY: Nothing on redirect, your Honor.

THE COURT: All right. You may step down.

(Witness excused)

THE COURT: I think we will now break for lunch.

We will reconvene at 2:30.

(The jury left the courtroom)

THE COURT: Very well. If there is nothing further we will reconvene.

Are you going to continue with surveillance witnesses this afternoon?

MR. KELLEY: Yes, your Honor.

THE COURT: And you think that will consume most of the afternoon?

MR. BODNER: We have quite a few going.

MR. LEVENTHAL: Your Honor, there is an issue. If you want to take it up now or after the break.

THE COURT: Let's resolve it if we can.

MR. LEVENTHAL: I believe that the government tomorrow will be intending to offer evidence with respect to the newly discovered bullet which they say was recovered from the interior of the vehicle in which Mr. Fiorito's body was discovered.

We would like to address that issue.

THE COURT: All right. Do you want me to

[2883]

preclude it?

MR. LEVENTHAL: First, if the court is going to — our first application is for preclusion. If the court is not going to preclude, we are going to ask for a mistrial.

THE COURT: You have already asked for a mistrial. A mistrial I denied.

MR. LEVENTHAL: The issue is with respect to preclusion.

THE COURT: Right.

MR. LEVENTHAL: The first — besides just a completely overview of fairness —

THE COURT: One second, Mr. Leventhal. Let me just ask you a few questions so I can get clear what your position is.

Do you have any reason to believe that the government knew anything about this at the this trial started?

MR. LEVENTHAL: Do I have reason to believe that they had actual knowledge?

THE COURT: Yes.

MR. LEVENTHAL: Your Honor, I personally have no information which would lead me to believe that they had any knowledge of the fact of its existence.

THE COURT: So there is no evidence of

[2884]

wrongdoing, I take it, on the part of the government, because that's important.

MR. LEVENTHAL: My knowledge with respect to the discovery of this bullet and Mr. Batchelder's knowledge based upon the discovery of this bullet comes exclusively from that of the government. I have no other knowledge from any other sources which would, one way or the other, give me any personal knowledge as to whether or not there was any wrongdoing or not wrongdoing, although I will not stand here and accuse Mr. Bodner and Mr. Kelley of wrongdoing because that is not something I am prepared to do.

THE COURT: Do you have any reason to believe that there was any wrongdoing?

MR. LEVENTHAL: No.

The issue, I think, is whether or not, and this I guess would be under Rule 16, whether or not the prosecutors in this case exercised, or the government in this case exercised due diligence in order to discover this evidence and advise counsel in a timely fashion sufficient that we could formulate a defense with respect — and not be prejudiced with respect to it.

THE COURT: Wait a minute just a moment. Wait just a moment. You have shifted grounds a little bit. You are quite right that on the issue of due diligence, the burden of showing that is on the government. But when you

[2885]

say to avoid prejudice, if indeed they exercised due dilligence and turned it up as soon as they could possibly have turned it up, the second part is a non sequitur.

MR. LEVENTHAL: True. However, I think it goes in part and parcel to whenever — the question of due diligence —

THE COURT: Are you arguing even if they exercised due diligence, that they should be precluded?

MR. LEVENTHAL: Yes.

THE COURT: You need to give me authority on that.

MR. LEVENTHAL: I think I am prepared to argue at this point the due diligence aspect.

THE COURT: What showing has the government made on that?

MR. LEVENTHAL: My understanding, and again my understanding is based upon our communications with the government.

This bullet, and I know the case law is fairly straightforward when it talks about that the government, the

federal government should not be imputed with any actions taken by the state government in any prosecution in state court. I will accept that.

This case, however, with respect to the homicide — with respect to the entire case, but

[2886]

specifically with respect to the homicide, was being prosecuted or being prepared by the federal government, by the United States Attorney's Office, Southern District of New York, as early as, if not before, April of 1991. That's the date that Patrick Esposito entered a plea of guilty in federal court where an indictment was sealed — excuse me — where his allocution was sealed, to a sealed information, and pleaded guilty to this murder.

THE COURT: So what you are saying is that by April of 1991 the government must have debriefed Patrick Esposito.

MR. LEVENTHAL: Absolutely.

THE COURT: So they should have known at that time that there was another bullet. Or that there might be a bullet in the automobile.

MR. LEVENTHAL: I'm getting to that.

THE COURT: Well, isn't that your point?

MR. LEVENTHAL: Yes. I want to develop that a little bit.

THE COURT: That is the point, isn't it?

MR. LEVENTHAL: It certainly is. The point of the matter is that the government at that point in time knew all of the facts that they were going to be proving or trying to prove at trial, including the existence of a car, the existence of the fact that —

[2887]

THE COURT: You don't have to go into all that. Your point is this, that as of April 1991 Patrick Esposito had already told them or should already have told them, and maybe he didn't, I haven't heard that yet, that a shot was fired in the automobile.

MR. LEVENTHAL: Correct.

THE COURT: And at that point you are arguing the government was on notice that they should investigate more specifically as to the search of the automobile and whether the automobile was available for further search with respect to this bullet.

MR. LEVENTHAL: Precisely. I think —

THE COURT: I take your point very clearly.

MR. LEVENTHAL: In furtherance of that, I believe, and this is based on conversations with the government, and they said they were going to look into it today,

this morning, to find out the exact dates that this car, which are was impounded by the state, was released.

THE COURT: But in any event, it is your position that as of April of 1991 they should have made that inquiry?

MR. LEVENTHAL: Absolutely. And, what we have learned, what the defense has learned is that after this trial commenced, right, they commenced, they had a jury and we were commencing with opening arguments and producing of witnesses. The government took the VIN number, the vehicle

[2888]

identification number, the FBI took the vehicle identification number or some agent of the United States Attorney's Office took the vehicle identification number, ran that number through the Department of Motor Vehicles, tracked down a subsequent owner, the present owner of this vehicle —

THE COURT: You are saying that should have been done in April 1991.

MR. LEVENTHAL: Years ago.

THE COURT: I understand your position.

MR. LEVENTHAL: It is as a result of that along with their communications with this individual, who is now the owner of

this car and the conversations that they had with this individual —

THE COURT: Your position is all of that should have started by April of 1991.

MR. LEVENTHAL: Yes, Ma'am.

THE COURT: And if it had, you would have been in a position to have known about it in advance of the trial.

MR. LEVENTHAL: And we would have prepared a defense and cross examination of witnesses, all right, with that in consideration, and understanding that fact to be in existence, and we were not permitted that opportunity.

THE COURT: All right. Mr. Kelley, why was this not pursued in April of 1991? Or Mr. Bodner, whichever of

[2889]

you wants to address this.

MR. BODNER: Judge, just to give the chronology as I understand it. I want to nail down a little more precisely when —

THE COURT: It doesn't have to be April of '91. I assume that you debriefed Patrick Esposito sometime ago.

MR. BODNER: Judge, I was not involved in the case at that time, but it is my understanding that when Patrick Esposito first came in, he gave consistent facts to the government that a second shot had in fact been

fired in the car. No question about that.

THE COURT: Whenever that was, it was a long time in advance of the trial.

MR. BODNER: Absolutely. No question about it. What happened is the Crime Scene for the City of New York did an examination of the car when they found it on September 21st of 1990.

THE COURT: That was before —

MR. BODNER: Before Esposito became a government witness.

THE COURT: What you had was a report from the crime scene, is that correct?

MR. BODNER: Exactly. The report was, so far as we understood, they had done a full examination of the car.

THE COURT: I understand, but what made you

[2890]

inquire later when you hadn't inquired earlier?

MR. BODNER: Then as we began to approach trial in early '93 we began to look for the car. We then —

THE COURT: Why didn't you do that originally ?

MR. BODNER: Judge, we were at that point relying on the Crime Scene report that a thorough search —

THE COURT: What made you decide not to continue to rely on it?

MR. BODNER: In a effort to get ready for trial we decided to find the car.

THE COURT: I have a lot of trouble with that.

MR. BODNER: Judge, at that time —

THE COURT: Because in an effort to get ready for trial, before selecting a jury and before advising the defendant that there was no bullet retrieved, if you were going to pursue it, it seems to me you had some obligation to pursue it.

MR. BODNER: Well, Judge, there are a couple things here.

First off, it was our understanding that the car had been impounded.

THE COURT: Well, I understand that.

MR. BODNER: If I may finish, Judge, please.

It was our understanding that the car had been impounded. As a result, in early 1993, long before the

[2891]

trial was set in this case, we sought to get that car in order to do any further reviews or any further analysis or inspection that should be required for trial.

THE COURT: When did you do that?

MR. BODNER: That was in January of 1993.

THE COURT: So in January of '93 what did you do?

MR. BODNER: At that point we looked for the car, assuming that it was impounded by the City of New York. At that point we discovered that it had been released from impound.

THE COURT: So in January of '93 you found that it had been released?

MR. BODNER: Correct.

THE COURT: What did you do then?

MR. BODNER: At that point we took steps —

THE COURT: What steps?

MR. KELLEY: Your Honor —

MR. BODNER: Mr. Kelley knows the details.

MR. KELLEY: First of all, your Honor, you are correct, the record is correct that Mr. Esposito had given all these details.

A couple months after that, in the summer of '91, the FBI and the NYPD went out to the impound area and did another inspection on the car even though, despite the Crime Scene report, that nothing had been found during their

[2892]

inspection.

It is my understanding —

THE COURT: What did they do at that time?

MR. KELLEY: Just looked through the car to see if there was anything that was missed by the Crime Scene. The Crime

Scene Unit had done an investigation both at the scene and again once it was taken into impound because it was dark at the scene.

Late in '92, beginning '93 we wanted to take another look at the car to be triply sure because we had already done two examinations and we found that the state, unbeknownst to us, the Queens District Attorney's office, who had been out of the case since the very beginning of '91, had released the car without consulting us, which came much to our shock and dismay since they had no authorization essentially to release evidence we were going to use in our case.

THE COURT: You say this is in January '93 —

MR. KELLEY: My best recollection is late '92, early '93. Thereafter we did make some efforts to find the car and we were not successful. In fact, I think if my recollection serves me that we thought that the previous owner was in Florida and couldn't be contacted.

We tried again to find the car and located it several weeks before trial. And several weeks before trial

[2893]

we located it and it was on Long Island by, I think, either the second or third owner. We went to that owner, two detectives, pulled up the

rug, pulled up the seat and found nothing.

Now, they left —

THE COURT: This was when?

MR. KELLEY: I believe in August of this year. A few weeks before trial. Once we were able to find the car.

Now we are of the view, okay, there is no bullet. Crime Scene was right. The detectives who checked it, Crime scene twice checked it and found nothing. The detectives who checked it in December '91 found nothing. Now we again have found nothing. So obviously we are doing this because if there is a bullet in there it is very important to our case. We found nothing.

Right as trial was beginning, what happened was when the detectives pulled up the carpet it unearthed blood and decay that had been left there from the murder. There were dead maggots and so forth.

THE COURT: When you say the detectives —

MR. KELLEY: In the summer of '93 before trial.

THE COURT: August of '93.

MR. KELLEY: When they pulled up the rug they disturbed what had settled there. Blood and dead maggots. The owner to their dismay found it was quite smelly so what

[2894]

they did on their own was to go and pull out the insulation underneath the rug thinking that by removing that insulation they would remove the smell. In ripping out the insulation, which I understand to be quite a tedious and disruptive task, a bullet dropped out onto the floor of the car, at which point they called us. We got it.

THE COURT: What was the date they found that bullet?

MR. KELLEY: September 6th. We then took it and asked for an analysis by the laboratory and by ballistics to find out if there was any connection with what we had, and that's when I notified defense counsel.

THE COURT: When you asked that they examine it?

MR. KELLEY: Once I found out that it was a bullet that was likely to be a .380, our first inquiry was whether or not it could be matched to that casing. We were told, no, it could not.

Then we asked to see whether there could be a serology examination made, and the lab said no, they could not do that. And during those few days is when I told counsel about it and it is in my letter.

At the end of that week we hadn't had anything certain about what that bullet, what the origin of the bullet was and whether there was any connection. But I told counsel about it and the following week when we had

[2895]

discussed it before your Honor it was being examined by ballistics and as soon as we determined, ballistics determined there was a connection between the two bullets, both the court and defense counsel were apprised of that.

THE COURT: When you found that the car had been released, what steps did you take to reacquire it?

MR. KELLEY: We tried to find the person to whom I believe it had been released. It was my understanding that person was in Florida, and the efforts made at that time to find the car were unsuccessful. I'm not quite sure —

THE COURT: Who made what efforts?

MR. KELLEY: Members of the New York City Police Department and people in my office tried to track it down.

THE COURT: Did you advise the defendant that that car had been released and was found?

MR. KELLEY: No, we had not. But from the very beginning of the case when we made

discovery, there was no request with regard to making examination even though our evidence we said would be available, all the evidence we intended to use at trial would be available for their discovery and inspection, and no requests were made at that point, nor has any been made until this time. In fact, I made discovery in this case in August of '92 —

THE COURT: So there has never been a request to

[2896]

examine that automobile?

MR. KELLEY: That is correct, your Honor.

In all fairness, Judge, I never mentioned the car specifically. The evidence that the government intended to use would be available for their inspection at a mutually convenient time and not at any time thereafter did they say hey, can we look at the car?

The Crime Scene photos were available of the car and the body in the car that were looked at much later, say in the summer, early summer of this year. In fact, I believe defense counsel even subpoenaed from the Police Department all the records they had that we later turned over as 3500 material. That was available for discovery and inspection. At no time did we

receive a request from them, where is the car? We want to look at it.

THE COURT: Why would they want to look at it if they were advised you hadn't found the bullet. They certainly didn't want to find the bullet.

MR. KELLEY: Judge, we didn't find the bullet either. There are other things they could have looked at the car. If they were interested in fingerprints. Perhaps their own experts could have examined it. No request was made. It was something we tried to do and were unsuccessful.

THE COURT: Did you advise anybody that it was

[2897]

impounded by the New York City police and remained impounded?

MR. KELLEY: That was the procedure, Judge. No, I didn't.

THE COURT: I understand you never assumed anything.

MR. KELLEY: Judge, if I have a piece of paper in front of me from the New York City Police Department that says impounded by the detectives that go to the impound area and they say the car was there, I think it is a safe assumption that the car is is there. Unfortunately because of the intervention by the Queens District Attorney's office, that was taken

away from me. I checked it. It was there.

THE COURT: When did you check that it was there?

MR. KELLEY: After we had debriefed Esposito in the summer of '91 the agents went there and examined the car even though they already had the reports of Crime Scene Unit that said a check had been done and nothing had been found.

There was a delay in this case. We were ready for trial. You were going to set a trial date and we were talking about it in October. Right after that the Queens District Attorney's office releases the car without —

THE COURT: Without advising anybody?

MR. KELLEY: Absolutely not.

[2898]

THE COURT: Neither you nor the New York City police were advised by the Queens District Attorney's office, is that correct?

MR. KELLEY: To the extent I knew about it, Judge. We did not know about it.

Obviously, to be taken out of the impound area some sort of paperwork has to be filled out by the police department. The way the Queens District Attorney's office was involved is that they initially

were the office to prosecute the murder and had charged Patrick Esposito. It was several months later that we intervened and essentially took over the case, although they still maintained an open file on the case. That's why I guess they thought they had the authority to release it even though that there had been a relationship developed and we told them not to release the car.

THE COURT: Have you ever contacted the Queens District Attorney's Office to find out what prompted them to do that?

MR. KELLEY: They just thought — they never consulted with us and they thought they could do it. The Assistant District Attorney who, without thinking, thought, we don't have Esposito here. We are not trying this case. We can release it.

We were quite upset with them and conveyed that

[2899]

to them when we found out about it.

MR. BATCHELDER: Your Honor, I just would like to say that Mr. Shargel put in a rather detailed discovery request. It is in the file.

THE COURT: I would like to see that.

MR. BATCHELDER: It is in the file, and he did it for all parties. More importantly, when Mr. Leventhal and I were preparing the

case, we went and saw at Mr. Kelley's offices all the photographs and everything else that we could see.

THE COURT: That's all they had at the time.

MR. BATCHELDER: You have to step back from us and take a look at the Crime Scene reports and everything else with respect to that. Even if we had the Crime Scene reports, all right, it would have showed us that there was no bullet.

THE COURT: Well, I understand. But everything that the agents did as I understand it last summer also would have shown there was no bullet.

MR. BATCHELDER: The second thing is, Mr. Leventhal and I to this day, we never knew that there was a second tearing of the car apart. I don't have a report on that. I never have.

THE COURT: You are talking about the intermediate one. But the representation has been made that

[2900]

that wouldn't have made any difference.

MR. BATCHELDER: Fine. We are sitting here and we are starting along in the trial on the basis that there is no bullet. Now we are three-quarters of the way into the trial, when all of a sudden there is a bullet that matches —

THE COURT: Wait, wait, wait. Just a moment. I thought you were advised on September 6th that the owner had pulled out the insulation and a bullet had dropped out. Isn't that what you just represented to me, Mr. Kelley?

MR. KELLEY: No, your Honor. The bullet was discovered on September the 6th and once that I submitted it to ballistics — this is what I said, Judge.

THE COURT: Then I misunderstood you. I don't understand why you didn't advise the defense on that date that a bullet had been found —

MR. KELLEY: I didn't know anything that could be done with it. The initial thing was that there could be no match made to the case. So then we submitted it for serology. At that time I advised counsel that we had discovered this.

THE COURT: Why did you wait a minute? Once you discovered that a bullet fell out when the owner pulled out the insulation, we had not yet finished jury selection at that point, isn't that right? Isn't that right, on

[2901]

September 6th?

MR. KELLEY: Beg pardon?

THE COURT: We were still in the midst of jury selection.

MR. KELLEY: The jury had been picked —

THE COURT: What happened on September 6th?

MR. KELLEY: It was a holiday, your Honor, Labor Day.

THE COURT: Then the trial — opening statements didn't start until September 8. Why didn't you advise —

MR. KELLEY: September 7th, your Honor. I didn't know if there was any connection to the bullet.

THE COURT: Suppose you didn't.

MR. KELLEY: Beg your pardon?

THE COURT: Suppose you didn't. If you had put them on notice that something had turned up that might be of use, why didn't you have that obligation at that point?

MR. KELLEY: I was trying to ascertain if —

THE COURT: I understand what you were trying to do. In the meantime, though —

MR. KELLEY: In fact, the first indication was there was nothing I could do with it because there was no match.

THE COURT: Then you could have advised them of that when you found that out.

[2902]

MR. KELLEY: I didn't see the need to do that since there was nothing that could be done. My initial report from ballistics was nothing could be done because a comparison couldn't be made to the present evidence.

THE COURT: I understand. You wouldn't drop the inquiry at that point. Of course not. Why would you? You wanted to pursue it, isn't that right?

MR. KELLEY: Well, at first I didn't pursue it, Judge, and then I did, yes.

THE COURT: That, it seems to me, is a troublesome point. Why in view of the fact that we were on the eve of trial you did not advise the defense that although you had no reason to believe that you could use this, that had turned up?

MR. KELLEY: Your Honor, I think the important point, too, is also to look at, you know, trying to discover if there is any prejudice here. The issue is this is what they opened on, this is on page 42 of the transcript. There is no scientific evidence that points to defendant Massaro.

THE COURT: That is still correct.

MR. KELLEY: That is still correct. More importantly, Judge, when they were told there was a bullet, Mr. Batchelder had just started his cross examination of Patrick Esposito. He had all Friday and he had the whole

[2903]

weekend to think about my letter where I disclosed the bullet and that did not change anything. He still continued in his cross examination

of Patrick Esposito. After knowing what we knew. And also that continued well before anything relating to the Medical Examiner, and so forth.

I think the record, you would be hard put to find any sort of prejudice here to the defendant once this trial started.

THE COURT: I think that's what I want to examine. What is the date exactly on which you advised the defendant of this discovery?

MR. KELLEY: I did it by letter of —

MR. BODNER: Judge, my memory, the letter is dated September 11th, 1993.

MR. KELLEY: Your Honor, what I did was, I didn't learn of the bullet until the following day from the agent and I asked to get a check to see what the connection was. And then later that week is when I disclosed it.

THE COURT: On September 11th you are telling me that Patrick Esposito not yet been fully cross-examined?

MR. KELLEY: They started the cross examination briefly late Thursday afternoon. We broke. The letter was delivered by fax over the weekend concerning the bullet. And on Monday morning, again, before cross-examination resumed, and the bulk of the cross examination of Esposito

[2904]

occurred that, after that weekend and after the letter had been received.

[2905]

THE COURT: And was he your first witness?

MR. BODNER: He was the first witness and who had nothing to do with it.

Then Patrick Esposito took the stand on Wednesday the 8th. He was on direct examination for Wednesday the 8th and virtually all of Thursday, September 9.

Mr. Batchelder had, I believe, had all of about 40 minutes of Esposito on cross-examination, and the thrust of the-cross-examination was his bail status, the deal with the Government. And there was nothing pinpointed in any prejudicial way, in my memory, to the details of the murder at all.

The thrust of the cross-examination concerning the murder commenced on Monday the 13th and into, I believe, Tuesday, September 14. So by that time Mr. Batchelder was completely on notice about what we knew at that time.

Furthermore, the cross-examination of the crime scene and the medical examiner was well after the September 11th letter. And my memory — I can't put a date on it, but

my memory is that there was a conversation with counsel before we wrote the letter on September 11. But I can't put a date or a time. It was an informal conversation, not on the record. But I have a memory of that.

MR. BATCHELDER: Your Honor, the letter is the letter of September 11, and I have a copy here. I

[2906]

understand, it says by hand, but I believe it was sent by telefax person.

THE COURT: So it was, in effect, hand delivered.

MR. BATCHELDER: Yes. And your Honor knows I work every Saturday and Sunday. I probably got it — there's no question about it, but I think the contents are rather interesting. It says and this is five days afterwards. It says to "please be advised, on September 6 a bullet was recovered from under the carpet of the rear seat of the Monte Carlo in which the body of Esposito was discovered" and that the bullet has been submitted to the New York Police Department for tests and "will be available for your examination shortly."

"In addition, a video recording demonstrating where in the vehicle the bullet was recovered and the hole that was caused in the carpet of the

car is available for your inspection in the United States Attorney's Office.

"We will advise you promptly if the government intends to offer either the video or the bullet in its case in chief."

Now, I don't have the next letter.

THE COURT: I understand, but let me stop you right there. At that particular time you were on notice that a bullet had been retrieved.

MR. BATCHELDER: Yes, on the Saturday or

[2907]

Sunday — I believe the Sunday evening.

THE COURT: The first time you raised it with me, I offered you a continuance.

MR. BATCHELDER: A continuance would not have done us much good. We managed to have the bullet submitted to our expert, and as we talked with our expert today concerning the matchup — that is fine. I am saying to your Honor, as your Honor knows, our position was that — and you may remember, on cross-examination of Dr. Lee by Mr. Leventhal —

THE COURT: I understand. But why did you take that position once you were advised that a bullet had turned up?

MR. BATCHELDER: We took the position, your Honor, because as we started out thinking that there had been no bullet, and she didn't know which shot came first or second — you may remember that.

THE COURT: But on September 11, which was some time before she testified, you were advised that a bullet had turned up.

MR. BATCHELDER: Except they didn't know whether there was any matchup.

THE COURT: But in fact they did not.

MR. BATCHELDER: My question to you then is why do we go for seven or eight or ten days further to find out

[2908]

that there is a matchup?

THE COURT: Why didn't you ask for a continuance until they determined that? I offered you a continuance the minute you spoke to me.

MR. BATCHELDER: You offered us a continuance after, your Honor.

THE COURT: If you had applied for it that moment, I would have offered you a continuance.

MR. BATCHELDER: Your Honor, perhaps I will take the weight for that. But if that rises or falls as to the prejudice, I will take the weight. But I think the government, most respectfully, should have

been able to have, in our hands — since they had the bullet and they have the people — it took our expert all of about 15 seconds to do this on a microscopic examination. It didn't take a week to get this to us, most respectfully.

THE COURT: If I were you, I would have immediately asked —

MR. BATCHELDER: Your Honor, I was married once before, and we make mistakes. I may have made a mistake. I made a mistake. Is Mr. Massaro to pay for my mistake when the government comes in and says they found a bullet? Are we to split hairs like this?

THE COURT: This is not a matter of splitting hairs. I am trying to determine whether the government did

[2909]

anything wrong here. I want the best authority both sides can give me on whether that matters.

MR. BATCHELDER: Your Honor, the question is —and Mr. Bodner is very keen on antitrusts. Did the government use due diligence to get this in our hands? That is the issue. And, your Honor, that is what you have to decide.

THE COURT: You need to give me a case and say that that is the issue. And if

the government didn't have that examined fast enough, that I should preclude that. I need to consult authority.

MR. KELLEY: I have looked at some cases, and I will do so again. I think you will find facts that go all over the place, and it's up to the Court's discretion.

THE COURT: I find it troublesome. I find the time sequence here troublesome.

MR. KELLEY: I want to make one point that should be made. Yes, we were working on an assumption all along that no bullet had been found in the car. And anything can happen to a bullet. It could have gone right through and out of the car. It could have bounced out anywhere. It could have come out —

THE COURT: I understand.

MR. KELLEY: Let me go right to the point. The point is there was a .380 shell casing in that car. The

[2910]

person is going to be hard put to make the argument that — that shell casing was found in the car and no bullet. The bullet could have fell out of the body when it was moved.

THE COURT: What you are saying, that the shell casing itself was substantial evidence that there had been a shot in the car?

MR. KELLEY: And there was a photograph.

THE COURT: So you were taking a very big risk when you were asking the jury to ignore that.

MR. BATCHELDER: Your Honor, there was nothing on the shell casing that said it had anything to do with this one, and we understood when we looked at it, given the size of the exit wound, that it was not a .380. That is what we looked at.

THE COURT: Don't you have to look at the shell casing?

MR. BATCHELDER: Your Honor, we believed that that shell casing had nothing to do with that matter. Indeed, the government contended when they talked to us that they didn't know that the shell casing matched up.

THE COURT: That's not the point. You were on notice that there was a shell in the car, so it was hard for you to take the flat position that, under no circumstances was a bullet fired, isn't that right?

MR. LEVENTHAL: I disagree, your Honor. And the

[2911]

reason I disagree —

THE COURT: All right, I need your best cases on the subject, and I will have to analyze what you knew and should have known and could have

believed. You know you also can't assume anything. No good lawyer assumes anything.

MR. BATCHELDER: Your Honor, I dare say, with all due respect to the government, but when it stands here — we looked at every single piece of physical evidence that was to be produced in this case. We made them — we even went through dungarees. We went through everything.

THE COURT: But you never requested to look at the automobile.

MR. BATCHELDER: Your Honor, I didn't even know where the automobile was.

THE COURT: Did you ask?

MR. BATCHELDER: No, I didn't.

THE COURT: Why not?

MR. BATCHELDER: Because I have got a crime scene report which indicates that there is nothing in the automobile that is going to be helpful to us.

THE COURT: So you are telling me you didn't want to know?

MR. BATCHELDER: No, quite the contrary. Their evidence showed that there was no exit. There was no bullet

[2912]

in the car.

THE COURT: It showed there was no bullet in the car. The question is this: Is the fact

that there was a shell casing a sufficient concern from which, for example, the government might have argued that that confirmed that there was a bullet?

MR. BATCHELDER: Except that we took the position, and when we spoke to our expert, that the exit wound was from a different type of weapon. That is what we understood it to be, that the .380 shell casing was not germane to what our expert had said —

THE COURT: Did you ask what the government's expert said about that?

MR. BATCHELDER: Your Honor, the government's expert was Dr. Lee who was brought in here about 10 minutes before she testified:

THE COURT: She didn't testify on the shell.

MR. BATCHELDER: We tried to get a hold of Dr. Jean without much luck and tried to track him down. And he is around.

But with respect to the issue of the shell casing and the exit wound, we spoke to our expert, your Honor, and our expert indicated, in his mind anyway, that the exit wound was not consistent with a .380 bullet. The shell casing was not that crucial to us.

[2913]

THE COURT: But she testified you can't tell from that.

MR. BATCHELDER: I am telling what our expert says.

THE COURT: But you can't expect the government to know what your expert says.

MR. BATCHELDER: You can't put it to us when we rely on what he says about the exit wound. If this is a hollow soft-nosed — it is one of the smallest exits I've seen in any life.

THE COURT: We listened to the medical examiner testify that you cannot tell anything about the bullet from the exit wound.

MR. BATCHELDER: I am sorry, your Honor, we disagree with that. And our expert disagreed with that. And our expert has a lot more experience that a person who was brought up six days before to testify, most respectfully.

So this is the way we approached it. It's irrelevant. If you remember the cross-examination, your Honor about that medical examiner, the very next day after we showed up with the x-rays — which were forgotten — "Oh, by the way, now we can tell which is the second shot." At that point, at that point, yes, then it stops.

THE COURT: You requested the x-rays, and I

[2914]

directed the government to track them down.

MR. BATCHELDER: And it was at that particular time, your Honor, that she told us that the

second point in the shot she could say there was a second shot in the car. It was at that point —

MR. BODNER: Exactly, which is important for putting everything in perspective for the government. Prior to the cross-examination of the medical examiner, and even though we subpoenaed the medical examiner's office for all those records twice, as came from cross-examination, we didn't get full compliance because we never got the x-rays.

THE COURT: The medical examiner testified that they were misfiled.

MR. BODNER: Exactly, Judge. It was at that point, even at that point that we could tell which shot was fired first and that in fact the second shot was the shot with the exit wound. Prior to that examination of the medical examiner, it was hard to tell whether it was the first shot or — it was impossible to tell whether the first shot or the second shot that had the exit wound.

Therefore, when no bullet was found in the car, given the government's thinking, given we didn't know the order of the shots, it was the second shot that was without the exit wound. That is why no bullet was found in the car.

THE COURT: I understand all that. The only

[2915]

question is whenever you should have have gotten this information sooner.

MR. BODNER: Judge, the information about the x-rays —

THE COURT: I am not talking about the x-rays. There is no motion for preclusion of the x-ray. It was the defendants who requested that you search for the x-rays and they got the x-rays.

MR. BODNER: But the point at the time that of the second bullet was on September 11. There was no prejudice whatsoever to the defendants. At that point all the cross-examination, the whole line much inquiry they were on notice they knew what we did. They chose not to pursue it and not to ask for a continuance. And now Mr. Batchelder is saying that the government is to blame for what they did. That simply is not true. He chose to pursue that line of cross-examination.

THE COURT: You could have asked for a continuance in the middle of your cross-examination of the medical examiner.

MR. BATCHELDER: Yes.

THE COURT: The question is, is this unfair prejudice. The usual rule is we want to get at the truth, isn't that right?

The only question is, is there unfair prejudice here, isn't that the issue?

[2916]

MR. BATCHELDER: That is the decision for you to make, your Honor. And you have mostly all the facts. With all due respect to Mr. Bodner, they are saying "Oh, we did everything and now it's our fault because we didn't ask for a continuance. Most respectfully, your Honor, every report that Mr. Leventhal and I looked at showed no exit. Now, if I am cynical, I am showing that, once they got wind of where it was going, this came about. They say no. Fine and that is just where it stands. That is a hard call and that is your call, your Honor.

THE COURT: I understand. I want you to give me your best case on the subject.

I want you to do the same, the government.

And I would like a very clear written recital of exactly what happened, the sequence.

MR. BATCHELDER: Your Honor, they made a videotape. We got it this weekend. They made a videotape of the search of the car and that the government intends to play. We got that this weekend.

MR. KELLEY: We told him it was available when we wrote the letter of September 11.

MR. BATCHELDER: In addition, the recording where the bullet that was recovered and how it was caught in the carpet. I looked at it for the first time this weekend.

THE COURT: Why did you wait?

[2917]

MR. BATCHELDER: Because I am in the middle of keeping five balls up in the air, your Honor. I am coming in here at 8:30 in the morning. Maybe I missed it. Let me give it to you right where it is. So that there's no indication of delay on our part, we then attempted to locate it and the government, if we could talk to the person who owned the car now, to discuss it. The government, as is usual, came up to us and said, by the way, they don't want to talk to us.

THE COURT: That has nothing to do with the problem.

MR. BATCHELDER: Your Honor, we are trying to cover all the bases. We would like to talk with that person to find out if that is exactly the way —

THE COURT: That is a separate issue. Please let's get back to the beginning. You moved for a mistrial. When was that?

MR. BATCHELDER: Your Honor, I think it was almost —

THE COURT: You didn't move for a mistrial when you got that notice. You moved for

a mistrial after they found out that the bullet matched up.

MR. BATCHELDER: After the report that was given to us on September 27, your Honor, of the date of the ballistics report, the worksheet is September 27. It took

[2918]

them 16 days from September 11 to compare the bullet that they had with the bullet fragments. That is what the government's position is. We got those bullet fragments. We got this worksheet on September 27, and my best estimate is, it was over at the office, with the assistance of the agents, the very next day.

THE COURT: So what you are telling me, whoever does these things, moves with the speed of molasses?

MR. BATCHELDER: No. Most respectfully, your Honor, I submit, if they had it on the 11th and they brought it over to New York P. D. and Detective Carbone is part of the New York Police Department and told us to do it because we are in the middle of a trial, it would have been done.

It's not an extensive examination that takes hours and hours. But the government then wants to submit ot to serology, and they decided they couldn't submit of to serology until they got the ballistics back because it would have resulted in the de-

struction of the bullet. That is what the story is.

Now the date of the occurrence, I am just looking. Here it is. The date that this information was received, according to the casework sheet was 9/22 of 90 when a lot stuff was taken. There is no indication — notification seemed to be 9/24, 9/28, but it's not quite clear what date that this was given over to them, based on

[2919]

that worksheet, and I don't know. But I know that, if they had it on the 11th, the first time we knew that the bullet matched up was some 16 days later.

MR. KELLEY: That's not quite accurate. On September 24 we had a conversation in court, and the Court directed me to find out, and I told the Court I would find out by Friday afternoon.

On Friday afternoon I sent a letter giving all the preliminary findings that the fragments found from Fiorito's head and similar to the bullet that was found and the fact that we were trying to do serology, but it would cause the destruction of the bullet.

When we initially found the bullet, what we tried to do was get serology, do an analyses and they were having

a test with the proper test. They didn't have the proper materials. The moment we contacted ballistics and September — the date that Mr. Batchelder referred to is September 27. That is 1990.

MR. BATCHELDER: I am talking about when they first got it.

MR. KELLEY: September 27, 1990, that is the date of the murder. What they received on that date were the fragments that were removed during the course of the autopsy. The rest of the material, the bullet that was found from the car, they received on the 24th. That is from

[2920]

the casework sheet, because the person who told me that it was similar and so forth was not the person who did the worksheet. That person was unavailable. We said we have to have it done. We've got it for certain. What is the story, and that is on the 24th when he made out the worksheet and put September 24.

THE COURT: I would like to know what the legal issue is, but is this an issue of prejudice, if there is no misconduct.

MR. BATCHELDER: Yes, I think that is fair. Sure. It has to be. It has to be. That is your call, your Honor.

THE COURT: I want the best citation from each side, and I would like a clear chronology from the government of exactly what happened.

MR. BATCHELDER: Your Honor, I think the government has sent to you, least ways it looks like it, the letters of September 11 and September 27. I don't have what I call the second letter, the 24th. I don't have a copy of that.

THE COURT: The issue for me is whether the letter of the 11th should have put you on notice, isn't that right?

MR. BATCHELDER: That is part of it, that is right.

[2921]

THE COURT: Because the question is fairness.

MR. BATCHELDER: The question is fairness exactly.

Your Honor, could we come back at 2:35 could I ask for an extra five minutes.

(Lunch recess)

[2922]

AFTERNOON SESSION

3:20 p.m.

THE COURT: Good afternoon.

MR. LEVENTHAL: May we approach for a moment?

(At the side bar)

THE COURT: We were delayed because a juror was sick.

MR. LEVENTHAL: We would just like to advise the court that is my partner and he is going to sit and take some notes and be here here for a little bit of the trial. Anthony Emanuel.

THE COURT: All right. He is not making an appearance, is he?

MR. LEVENTHAL: No. He is going to be sitting there and taking notes.

THE COURT: I take it nobody objects?

MR. BODNER: No objection.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

JOSEPH MASSARO, a/k/a
"Joey Bang Bang,"
"Joey Bank," and
JOSEPH KERN, a/k/a "Joey K,"

Defendants.

S1 92 Cr. 529
(MGC)

October 6, 1993
10:45 a.m.

Before:

HON. MIRIAM GOLDMAN CEDARBAUM,
District Judge

APPEARANCES

MARY JO WHITE
United States Attorney for the
Southern District of New York
DAVID KELLEY
RANDALL BODNER
Assistant United States Attorneys

-and-

AVRIL FUGGER
Paralegal

HARRY BATCHELDER
BRAD LEVENTHAL
Attorneys for defendant Massaro

[3419]

MR. BATCHELDER: Thank you. That is a good place, your Honor.

THE COURT: We will adjourn at this time, and we will reconvene at 9:45 tomorrow morning.

(The jury leaves the courtroom)

THE COURT: I have read the government's submission very carefully. I have not received anything from the defense.

MR. LEVENTHAL: Your Honor, with respect to the case law which was submited by the government, it is our position that the decision, from our review of the cases, is that of a factual determination by your Honor as to whether or not there is in fact has been prejudice in this matter.

It is our position that, after reviewing all of the facts with the Court and reviewing the letter of the government, that by far, there certainly was prejudice with respect to the untimely manner in which this evidence was disclosed to us and that the failure of the agents of the government — and I am not talking about the New York City Police Department, but the agents of the government when the government commenced a prosecution starting in 1991 after Mr. Esposito had in fact began cooperating with the government and entered a plea of

guilty, which was in 1991, that from that point on, the government's failure to disclose the existence of this bullet —

[3420]

THE COURT: It did not exist at that time to their knowledge.

MR. LEVENTHAL: It did exist.

THE COURT: Mr. Leventhal, you are not claiming, I take it, that the government's chronology is inaccurate. As I read their chronology, the turning up of the bullet was what you might call a fluke. I agree with you that the government's agents were not very good examiners of the car, because three times they searched the car and found in bullet. But I don't think that that is any evidence of failure to disclose. That is evidence of failure to find.

As I understand the chronology that was given to me — and nobody has given me any reason to doubt its accuracy — it was not the government at all that discovered this bullet, but the owner of the automobile who did not like the odor, who decided to actually, literally, take apart the upholstery and to remove the insulation, at which point a bullet fell out.

Do you agree that at that point you were advised?

MR. LEVENTHAL: Can I just respond to that briefly, your Honor?

THE COURT: Yes.

MR. LEVENTHAL: I would submit, it was not merely fortuitous that this owner of this vehicle discovered this vehicle. The government had been in contact with this

[3421]

individual. The Government agents had removed the carpet of this vehicle and had dislodged, according to the government, what they described as blood and maggots from this vehicle.

THE COURT: But you are not complaining about the blood or the maggots.

MR. LEVENTHAL: I think it goes hand and hand. As a result of this continued, albeit thorough investigation or search of this vehicle by the government, which ultimately led this individual to know that allegedly something had occurred within the car and that the government had now dislodged areas of the back of the car, and after that this individual then decided to take out the insulation, according to the government, this bullet allegedly became dislodged.

Again, it is my position, your Honor, and I don't know whether the Court will take the same position, that you

can't look at these individuals actions in a vacuum. You have to look at the individuals actions in conjunction with the actions of the government, and at the time that the government was engaging in these actions, they never bothered to let us know about it. That is one of my positions.

THE COURT: What would you have learned if the government had told you that, "We searched this automobile and found no bullet"?

[3422]

MR. BATCHELDER: If you found blood and maggots, I would have have been the first guy — that would start any investigator. If I had known that, first of all — and we are not faulting the government — the guys that knows about all of this, we won't even speak to that. That is another side. But if I knew there were blood and maggots on the floor of this car, I would have looked where he was and where he was placed and all of this. I would — if I had the opportunity to do so, because it is another person's car — have gone right down to the floorboard to try to find out.

THE COURT: Let me ask you this. When you received notice from the government that the owner had found a bullet,

did you make any effort to contact the owner?

MR. BATCHELDER: We got ahold of Mr. Kelley concerning the owner. He said the owner would not speak to us. We didn't do that until last week, until we found out about the bullet. David informed us that they didn't know whether the shell fragments were going to match up.

THE COURT: You have not answered my question. Did you make any effort to speak to the owner of the automobile?

MR. BATCHELDER: We don't know who he is.

THE COURT: You were not advised who the owner was?

[3423]

MR. BODNER: Let me set out the chronology. I thought it was set out. We didn't give the name of the owner. This is how the conversation went with Mr. Leventhal as to whether I would give the name of the owner. I told him that I would not give the name of the owner. We contacted the owner to see whether or not he was interested in talking to defense counsel. Our concern here was — and in no way do I want to imply that Mr. Batchelder or Mr. Leventhal would have intimidated this lay witness, but the facts of the case, whether the individual's name be given to defense counsel. He said that he

would prefer that his name not be given to defense counsel. What I said to Mr. Leventhal, was that any type of voir dire outside of a hearing — this witness would be available in a voir dire, if they wanted to take that position. That is the position I took with defense counsel. And I standby that, and I think it was a fair position in light of the witness' preferences.

THE COURT: Did you know who owned the car originally?

MR. BATCHELDER: The only person we knew who owned the car was Mr. Fiorito.

THE COURT: Wasn't it his girlfriend's?

MR. BATCHELDER: It was Ms. Brunjes'.

THE COURT: Have you ever talked to Ms. Brunjes

[3424]

about it?

MR. LEVENTHAL: Yes, I have, on up through and after the time that the government advised us through this time. Never once, and I only spoke to her, I think, on three occasions, never on any occasion was I ever advised that anything had happened to this vehicle because, in fact, she's in Florida and this vehicle apparently is in New York.

MR. BODNER: This vehicle was released to her, and she is the one that gave it to a dealer

to sell. She knew who she gave it to, and that person knew who they sold it to. And presumably, she received the money.

MR. LEVENTHAL: I think it is unfair of the government to make a large jump and assume, first, that Ms. Brunjes would know who her car was sold to, if she did, and based upon that assumption, to know that I would have contact to the people she —

THE COURT: You are jumping far ahead of me. I wanted to know whether you ever asked Ms. Brunjes what happened to the car.

MR. LEVENTHAL: Yes. It was sold.

THE COURT: You knew that the car had been sold?

MR. LEVENTHAL: I knew that the car had been taken and sold. That was it.

THE COURT: When did you learn that?

MR. LEVENTHAL: When I spoke with Ms. Brunjes.

[3425]

THE COURT: When was that?

MR. LEVENTHAL: I would say that would probably be sometime in August.

THE COURT: So you really learned at the same time that the government, that the car had been sold?

MR. LEVENTHAL: Your Honor, I was relying on forensic reports by the New York

City Police Department that had been turned over by the government, that there was absolutely no evidence in the car whatsoever.

THE COURT: So was the government relying on that, originally.

MR. LEVENTHAL: I am not faulting them for relying upon that, your Honor. The fact is that they are prosecuting the case. It is their prosecution. They took over the prosecution, or they commenced the prosecution, sometime in '91 or '92 against Mr. Massaro. They knew full well of the facts before any of this information was ever turned over to us.

THE COURT: Let me short circuit this. There is no question that this turned up by fluke. The question is whether the usual policy of establishing the truth is outweighed in this case by some impropriety on the part of the government. Isn't that right?

MR. LEVENTHAL: I don't think it is necessary for us to show that there was impropriety.

[3426]

THE COURT: But some compelling unfair result.

MR. LEVENTHAL: And the unfair result is, your Honor, that in the midst of our having developed over the period of a year, a theory of the defense and having opened before a jury and having commenced a theory and formulated

an entire defense theory around certain facts, that now in the midst of trial we are now forced to now backstep and try to circle around ourselves.

THE COURT: Wait just a moment. You opened to the jury that there is no scientific evidence that Joseph Massaro was present. This bullet has nothing to do with that; that is still your defense, that it was not Joseph Massaro, that he was not there. That he was not there is really your defense.

Then what we have is the testimony of Patrick Esposito. You were advised before you really did any substantial cross-examination of Patrick Esposito — certainly before you reached the murder of Fiorito — that this had been turned up. There is no reason in the world why you should have pursued, not that your client wasn't there, but something about a bullet.

I am not sure what it is that you did with Patrick Esposito that hemmed you in on this. What is it that you elicited from Patrick Esposito that prevented you, when I offered you a continuance to investigate this matter

[3427]

further, from taking it?

MR. BATCHELDER: Let me give it to you, your Honor.

THE COURT: Yes. What is it that you elicited from Patrick Esposito?

MR. BATCHELDER: If I may respond, we are out preparing the trial and we open on the fact that there is no scientific evidence, i.e., ballistics, in that car.

THE COURT: You didn't say ballistics.

MR. BATCHELDER: No.

THE COURT: I don't think the jurors think of ballistics, but that is neither here nor there.

MR. BATCHELDER: And that may be true. But on the off chance had I said scientific evidence and I say there is nothing in that car to connect it, maybe just maybe somebody picked up on it. And perhaps I was inarticulate, as I am often, but when the government stands here and I open on that, I daresay the jury is not going to forget that.

THE COURT: Let's assume that is true. What is the scientific evidence that has now been turned up that places Joseph Massaro in that automobile?

MR. BATCHELDER: Not only that it places Joseph Massaro in the automobile — and Mr. Bodner places his hand up, thank God he is not doing our defense work for us — but

[3428]

the shot, I was proceeding on the idea that it was not a second .38 that shot him.

THE COURT: Suppose it was or it wasn't. Suppose it was a single gun and there were two separate bullets as described by Esposito. The issue is still the same. There is no scientific evidence that Joseph Massaro was there.

MR. BATCHELDER: My position was this, and we were going to develop this through another expert, and we told you about the exit wound theory, that when Esposito said he took out the gun, screwed on the silencer and took a second shot and let him have it, I thought that that was absolutely impossible to do, because I believed that it was a smaller caliber weapon that fired the second shot that killed him.

THE COURT: I understand. And clearly you were wrong.

MR. BATCHELDER: And clearly if I am wrong, your Honor, I was put in that position because I relied on what I had.

THE COURT: Wait just a moment. That is not so. By the time the medical examiner took the stand, you already knew that a bullet had been turned up.

MR. BATCHELDER: Fine.

THE COURT: I would think, in any event, that you would want to inspect that bullet before you did anything,

[3429]

and that is what I offered time for.

MR. BATCHELDER: Perhaps, your Honor would have given us an 11-day continuance. And perhaps your Honor doesn't know how they work over there.

THE COURT: Just watch your tongue.

MR. BATCHELDER: I am not critical. I am just telling what your view —

THE COURT: I can hear you very well without sarcasm.

MR. BATCHELDER: I am not being scarcastic. What was done in the ballistics shop could have been done in 30 minutes.

THE COURT: I agree with you that they should have done that faster. But that is not the issue. We are now discussing whether the government laboratory should or should not have been faster. What I am trying to focus on is what is the prejudice.

MR. BATCHELDER: That shell matched the shell fragments found in his head.

THE COURT: So that is true. That does not place Joseph Massaro there. What scientific evidence puts Joseph Massaro at the scene?

MR. BATCHELDER: It is not just that he isn't at the scene, the subset of that argument, your Honor, was — and we were developing it in our own way — that the shot,

[3430]

the second shot was not the same caliber as the first shot. And why, because there's no brain matter. There's nothing in the car.

THE COURT: Maybe that was in your mind, but you certainly didn't present that to the jury.

MR. BATCHELDER: We did the best we could, your Honor.

THE COURT: You may be telling me that you planned to argue something else. But you haven't argued it to anybody. This upset your plan is what you are saying.

MR. BATCHELDER: Absolutely. Not it upset our plan. It upset our defense, yes. Upset our plan, no. The fact is we had had spoken to a person —

THE COURT: We are talking about prejudice. We are not talking about the fact that you cannot use a certain line of argument.

MR. BATCHELDER: Your Honor, I rely on the Court's judgment that a shell fragment found halfway through the trial which matches up with a shell fragment found in the individual's head is not

critical proof in this case. And if the Court finds that it is not prejudicial to us, so be it.

THE COURT: All evidence is prejudicial. I am trying to determine whether it is unfairly prejudicial, whether it is prejudice that the government should have

[3431]

avoided. Obviously, I would have liked — we all would have liked it — if the government agents had turned this up instead of the person whose car it is, after the government agents concluded there was nothing there. And you can make the most of that. You can raise a lot of questions about whether it was there in the first place.

MR. BATCHELDER: How can I do that if the shell fragments match up? Am I to stand before a jury and say they didn't find this for two and a half years —

THE COURT: Look, I am not here giving you advice on what you should argue. I am trying to evaluate whether the discovery of this bullet at the time at which it was discovered has unfairly prejudiced the defense, not whether it has made it more difficult for you to assert certain theories, whether it has unfairly prejudiced the defense to the extent I should preclude the truth.

MR. BATCHELDER: The truth?

THE COURT: Normally, the policy in a trial is to permit the truth. We preclude the truth in those circumstances in which there is policy that makes it unfair to permit the truth, isn't that right?

MR. BATCHELDER: Your Honor, I don't want to get in to a philosophical argument with respect to the Rules of Evidence and truth.

THE COURT: The purpose of the Rules of Evidence

[3432]

is twofold, to promote the truth and to preclude proof which violates some other major public policy.

MR. BATCHELDER: Your Honor, I am not up on that. I can only indicate from where I stand, I think we have tried to articulate as best we can our theories for you as to why this is prejudicial. I think we have talked about this at length. Your Honor seems unable to accept whatever we've said, so be it.

THE COURT: Unless there is some reason to know that the government deliberately failed to find this bullet or deliberately held it back. I cannot put my finger on anything that has happened in this trial that unfairly affects the development of the defense. You opened to the jury that there is no scientific evidence that

Joe Massaro was there. Is there a gun that links him to this bullet?

MR. BATCHELDER: It's the same gun — it corroborates Patrick Esposito's testimony.

MR. BODNER: There is no gun that we are offering.

MR. BATCHELDER: It corroborates Esposito's testimony.

THE COURT: Doesn't corroborate his story that it was Joseph Massaro, does it?

MR. BATCHELDER: Your Honor, I assume, as a logical proposition, that if it corroborates the fact that

[3433]

the same gun was used twice, okay — and we took a different theory based on the fact of the exit wound. I think that is pretty persuasive. I think we will hear about that during the summation by the government.

THE COURT: Suppose you had known it sooner.

MR. BATCHELDER: Had I known that it matched up and everything else? Well, the first thing I would have done was taken the bullets, as we have already, and found that they matched up.

And the next thing, I would have done was sat down with our expert, "What are you talking about this exit wound. We know there are two .38s and one of them is a 22." That is what I would have done, your Honor. Because when I spoke to the expert well before this and Mr.

Leventhal spent the better part of this, that the exit wound, no matter what the hired gun from the medical examiners offices that the exit wound was not consistent with a .38. Couldn't say that it was. And then I am sitting there with a head with shell fragments that don't match up. Nobody said it's a .38. We can't say, "But the shell fragments that are in it —

THE COURT: I understand what your expert is saying that gave you a wrong steer.

MR. BATCHELDER: No, based on what we knew, I would then have sat down and said, "What is it?" I would have tried to develop something around it.

[3434]

THE COURT: I offered you the time. I again offer you the time to do that. The first thing I asked you, whether you could have not pursued a number of these things was whether you wanted a continuance.

MR. BATCHELDER: Your Honor, from our perspective — and I don't want to belabor this, the hour is late and you've been most patient — we told you where we came from when we got that information. And the first thing, we got that information, we did not know that the shell fragment matched up.

THE COURT: I understand that possibility —

MR. BATCHELDER: As I say, an adjournment of a trial until such time as we found that the shell fragments matched up — I can't believe, but I know the Court —

THE COURT: Suppose that had happened. Suppose you had taken that adjournment. What is the difference in the position you would have been in vis-a-vis the defense?

MR. BATCHELDER: I would have been right in the face of medical examiner, what she testified, why she couldn't testify as to it was the second shot. I would have been all over her, most respectfully.

THE COURT: What good would that have done?

MR. BATCHELDER: Because I would have said to her when she got up and testified, "I don't know when the shots came. I don't know which one was first and which one was

[3435]

second"

Now you know because you got the shell fragments that match up that it is the what took place in the car. And I would have asked her a few questions.

THE COURT: I will permit you to recall her and continue your cross-examination.

MR. BATCHELDER: I would like that, your Honor. I would know on the basis of that development, and I would like to do that examination most respectfully.

We will be talking about it, Mr. Leventhal.

THE COURT: What I am pointing out to you is this, at the time of the medical examiner's testimony, the government didn't know there were x-rays or did not have the x-rays. They were told they didn't exist —

MR. BATCHELDER: Your Honor, they —

THE COURT: Wait a moment. Just a minute. I directed the government to inquire again at your request, isn't that right?

MR. BATCHELDER: Mr. Leventhal brought out the fact, in a rather skillful way, that x-rays were available. It was his expertise —

THE COURT: Not that they were available, but there had had been x-rays.

MR. BATCHELDER: Again, your Honor, the medical examiner's office and everyone who has ever tried a

[3436]

homicide, knows that there are x-rays that go along with respect to head wounds, that go along with it.

MR. BODNER: There is no issue that we did not know of the existence of the x-rays

because of the cross-examination of the medical examiner.

THE COURT: I directed the government to try again because they were told they could not find the x-rays. The medical examiner testified they were misfiled. She was unaware of them and she had not seen —

MR. BATCHELDER: Because she had not seen a report and had not looked at the report —

THE COURT: She was aware that there was a reference to x-rays. She said that she could not find an x-ray.

MR. LEVENTHAL: The problem, which I will submit is one that is compounded. What we have here is a situation where under a totality — if you want to use the term "totality of the circumstances" — we start out, we're speaking with our experts and reviewing with our experts, no x-rays and there cannot be a determination as to which shot came first. And during cross-examination, the medical examiner, lo and behold, x-rays are discovered. And the very next day, lo and behold, based upon an examination of these newfound x-rays we can now make a determination as to which bullet came first and which came second.

[3437]

THE COURT: Mr. Leventhal, if you are suggesting that there's any impropriety, that

is what I want to understand. Impropriety is a different matter.

MR. LEVENTHAL: I would because of that — but with these two gentleman, we are not going to do that. But if you look, your Honor, as the totality of the circumstances with a view towards prejudice, not with respect to their impropriety — I am not going to say that themselves acted improper, I don't think that they would withhold evidence.

THE COURT: When did you have the medical examiner's documents?

MR. LEVENTHAL: When did we have the medical examiner's documents?

THE COURT: For several years?

MR. LEVENTHAL: Before trial.

THE COURT: So you already knew at that point that there were x-rays mentioned in the report, is that right?

MR. BATCHELDER: We took them up with our expert, and we were never provided with x-rays.

THE COURT: Because they didn't have them.

MR. BATCHELDER: But there was —

THE COURT: It was your understanding that they were never produced?

[3438]

MR. BATCHELDER: Quite the contrary. The documents which I produced to my expert, he

looked at the documents given by the government. He looked at the documents and he said their seemed to be no x-rays.

MR. BODNER: And we were never specifically asked where were the x-rays. We didn't know they existed. And clearly the defense was, they existed, because we didn't know there were x-rays —

MR. BATCHELDER: That is rubbish. That is rubbish.

THE COURT: Please let's not get sidetracked. I am trying to set aside all of these rhetorical remarks and get to what we are talking about.

MR. BODNER: If they say that's not what happened. I withdraw that.

MR. LEVENTHAL: Your Honor, if you look at a holistic viewpoint, we learn in the middle of trial that that is an existence of x-rays that were misfiled, however, that happened. And now all of a sudden in the middle of the examination of this witness, that they — she can now make a determination of the existence of this bullet. And now the government will introduce that bullet which corroborates Patrick Esposito and corroborates the medical examiner. Your Honor, with all due respect, if that is not prejudice, there is none.

[3439]

THE COURT: The question, I repeat, is not whether there is prejudice. The question is whether it is unfair. This woman took the stand, the medical examiner, and said that she had not been given any x-rays. That the government had not produced any x-rays.

THE COURT: And I said to Mr. Kelley, you said we want those x-rays and I said to Mr. Kelley, "I direct you to try again to get those x-rays."

MR. LEVENTHAL: Absolutely. Not to try again — they never tried, apparently.

THE COURT: Just a moment, the representation to me when I said, "Where are the x-rays," that we were assured there were none available.

MR. LEVENTHAL: I am sure that, if they asked for x-rays and they weren't given over to them. They were not trying to withhold any x-rays. And the point is, your Honor, I am not pointing fault at them — when I say fault, I am talking about intentional withholding of evidence. The point is isn't it a little bit strange that for three years, nobody can find x-rays and x-rays can't be found, but overnight they can?

[3440]

THE COURT: If you are telling me you think you helped the government by insisting on their pursuing those x-rays, as it turns out, that's true, but that is not what you had in mind. That's just the way the facts fell.

MR. LEVENTHAL: It was unfair — that in itself combined with —

THE COURT: You understand the government appeared without the x-rays. I directed them to make another effort.

MR. LEVENTHAL: The entire turn of events as they unfolded had caught us with, in a situation where, I submit, and it's going to be — it's going to be this court's fault, is that what I submit and I think what Mr. Batchelder submits is that we are unfairly prejudiced because we have, as the case has progressed with evidence that we were not aware of from the time we were preparing our case, into the time we started our case, into the middle of our case, existed and developed.

As a result of all of these things all of a sudden being found, we find ourselves in a untenable position of being put behind the eight ball. We are, I submit, unfairly prejudiced. The government will say otherwise.

THE COURT: I am trying to assess it, Mr. Leventhal. I am trying to recapture. My recollection is

[3441]

this. That it was on cross-examination — it was not at the beginning of the trial. It was not before the trial that anybody said to me there is reference to x-rays in this report. We demand to see them.

It was on cross-examination of the Medical Examiner for the first time that you raised the issue of x-rays. She said she was not given any x-rays. Mr. Batchelder made an impassioned speech about wanting the x-rays. And I said to the government, I instruct you to go back to the Medical Examiner's office and find those x-rays.

I suspect from what the witness said that she was really the one who ultimately found them because she went searching through the place and she testified that they were improperly filed. That she could not — she did not find them with the file of this autopsy. That they were misfiled.

MR. LEVENTHAL: I'm not questioning that either. The whole point I'm trying to make, and I'm sorry if I'm not being clear, is the fact if you take that in conjunction with the next prong, that

being this late discovery of the bullet, altogether I think it adds up, maybe not individually, but I think together it adds up to unfair prejudice.

THE COURT: The x-rays would not even have been discovered if you had not requested them.

[3442]

MR. LEVENTHAL: Your Honor, the point of the matter is on cross-examination for the first time we learned —

THE COURT: You —

MR. LEVENTHAL: I learned there were x-rays in the case.

THE COURT: They were not referred to in the — in the report.

MR. LEVENTHAL: Not in the discussion of my expert, your Honor, when I discussed it with him.

THE COURT: How did she know?

MR. LEVENTHAL: I don't know.

THE COURT: My understanding was she said there was reference to x-rays. But that she didn't have them.

MR. LEVENTHAL: I reviewed that autopsy report and unless the government can point me otherwise — if they will, they will.

MR. KELLEY: I can explain it, Judge. The autopsy reported and all the papers that the government subpoenaed from the

Medical Examiner had absolutely no reference to the x-rays. In fact, when Dr. Lee testified on the stand that there were x-rays, I said to her, I must have missed something. Where is it? And she went to my papers and she said the papers you subpoenaed didn't have it.

I subpoenaed all evidence relating to the Medical

[3443]

Examiner.

THE COURT: What papers had it?

MR. KELLEY: There was a check mark on one of the worksheets she had in the file that said x-ray, and that was not turned over. And in all the time I had gone through with her she didn't have it. She found it and that's how we found out about it. We didn't find out until the cross examination. We subpoenaed all evidence relating to the autopsy. Twice we did that.

MR. BODNER: Judge, furthermore, the x-rays came in without any objections whatsoever by the defense. At that point when the x-rays came into evidence they were on notice, well on notice of the existence of the bullet having been found in the car, so these were strategic choices they were making. At all times they had all the information the government knew at that time.

MR. BATCHELDER: Was it strategic — to respond briefly to Mr. Bodner's statement about our strategic defense, was it a strategic defense when we put her up there and she is on cross-examination and we asked her what the x-rays showed and she came up with saying, I'm sorry. Now I know it is the second bullet. She wasn't speaking to us.

THE COURT: I thought that was disclosed to you before you pursued it?

MR. BODNER: It was.

[3444]

MR. KELLEY: We disclosed it the first thing in the morning. Absolutely.

MR. BATCHELDER: That's what I am trying to say. Why wouldn't we pursue it? We're stuck with it. My point.

THE COURT: You could have objected to the x-rays coming in.

MR. BATCHELDER: What about the search for truth that Mr. Bodner is speaking about? Are we supposed to say we have x-rays and we would not put them in? They would have put them in if we didn't put them in.

THE COURT: You could have objected on this ground.

MR. BATCHELDER: That she found them overnight? We aren't doing so well on the bullet. Is there any reason to believe that the

court, in the exercise of discretion, would not allow the x-rays in? Why?

THE COURT: Just a moment, Mr. Batchelder. You had not asked me to preclude the bullet yet.

MR. BATCHELDER: No.

THE COURT: I offered you a continuance to sort the whole thing out.

MR. BATCHELDER: Your Honor, I heard you offered us the continuance, and we are all aware of that. All right. We are all aware of that. With due respect, continuances in the middle of trial are to try and clear up

[3445]

methods that should never have arisen in trial. Assuming they can be cleared up.

Mr. Leventhal and I are taking the position, and we have argued this to you to a fare-thee-well, that we did not believe it could be cleared up by a continuance.

THE COURT: I understand. I am trying to sort it out because I am having difficulty understanding that, although I understand that this is evidence that is harmful to the defendant, but that doesn't mean that it is unfairly prejudicial.

MR. BATCHELDER: Your Honor, that is an intellectual approach. All evidence is harmful—

to a defendant. All evidence. All evidence. So that's not the issue. We all know that.

What we're saying, this specific set of circumstances that Mr. Leventhal and I have tried to lay out to you, we believe, is prejudicial.

The call is yours.

THE COURT: All right. You would like to preclude not not only the bullet but the matching of the fragments?

MR. BATCHELDER: Yes. As night follows day.

THE COURT: Suppose I were to receive the bullet and not permit the matching up of the fragments?

MR. BATCHELDER: We both have the same idol, it

[3446]

appears from something you said the other day. I am once again reminded of something that Judge Weinfeld said to me when I was an Assistant about trying to stand on two stools. You can't really straddle, he said, because you get the worst of both worlds.

THE COURT: You don't want that?

MR. BATCHELDER: No.

THE COURT: You don't want me to let the bullet in but preclude the match of the fragments?

MR. BATCHELDER: Your Honor, if you allow the bullet in, okay, you are going to allow the jury to speculate on something that really — we both know not to be the truth — we both know to be the truth. You are going to have to either, as Alexander did, you have to cut the Gordian knot or you are going to have to live with the Gordian knot.

If you allow the bullet in, they can say, the same bullet.

How many cars, your Honor, do you think have .38s in the floorboards discovered two years later? That's why when you say we can cross examine that they didn't find it for two years, give the jury some credit. we are sitting there and saying, by the way, you didn't find it for two and a half years, but it doesn't match up.

It doesn't make any difference. That is no

[3447]

examination, your Honor.

THE COURT: You are telling me that you would not even amelioriate your situation to preclude the matching up of the fragments?

MR. BATCHELDER: Your Honor, if you step back, if you step back and they are going to introduce the fact from this person

they will bring in that there were maggots and blood on the floor, why would — the jury can speculate on all kinds of things, and then we really would be in a spot, it seems to me. I don't think it would be fair.

THE COURT: You are not concerned about the maggots and blood on the floor? You are concerned about the bullet?

MR. BATCHELDER: Yes. I think the government will bring in the maggots and blood on the floor.

THE COURT: Are you onto that? I understood the motion to preclude to be with respect to the bullet and the analysis of the bullet and the fragments. I think I should at least get clear what the motion is for.

MR. BATCHELDER: I think your Honor has has a clear grasp on that, your Honor. I think you have to preclude the whole thing. That's what we are asking.

THE COURT: What do you mean by the whole thing? You have to be very specific now.

MR. BATCHELDER: When I say the whole thing I

[3448]

mean the maggots and blood on the floor —

THE COURT: I hadn't thought about the maggots and the blood on the floor. I didn't

even understand that was being offered.

MR. BATCHELDER: I am sure that will be offered.

MR. BODNER: First off, as far as the Crime Scene photographs that were made available from the very beginning of this prosecution, showed in the back seat that there was blood on the floor, so there is no disclosure problem as far as the existence of the blood in the back of the car. So that should not be part of any consideration before because they have been arid are on notice and have been for quite a while of the existence of blood in the back of the car. So to me that's completely, should be out of the discussion here.

THE COURT: What do the maggots add to that?

MR. BATCHELDER: Age, your Honor.

MR. BODNER: Age and the timing of the age of the — it explains the smell of the maggots and the existence of the blood explains how this person came about to rip out the insulation to begin with.

Furthermore, Judge, as far as keeping out the ballistics test, it is our position that that would open ourselves to the cross examination by the defense or even indeed, the speculation by the jury that this is not

[3449]

indeed — that somehow the government planted the bullet there or this person for whatever motivation he might have, planted the bullet there, because it was only found two-and-a-half years later, when we all know that that is not the fact when the ballistics match up with the fragments in his head.

Therefore, we think it would be, as far as seeking the truth, a disastrous result to allow the discovery of the bullet on Labor Day to come in without matching that bullet with the fragments found in the victim's head.

THE COURT: The real difficulty is you explicitly advised that they had told you they could not match it up.

MR. BODNER: No, Judge. It was not — not that at all. What we advised them, there was a shell casing found in the back of the car that was disclosed very early on, which is somewhere — we are somewhat surprised that the defense took the position there was never a second shot in the car because indeed, there was a shell casing in the car from a .380.

What ballistics told us was that they couldn't match the shell casing up with the bullet that was found.

We never took the position that there would be no ability to match the fragments in the head with the shell that was found. That is apples and oranges.

[3450]

MR. BATCHELDER: Once we got to the apples, you know, once we got to the shell casing, we can't match it up to the bullet, then you know it is a different horse race. This is not an easy question.

THE COURT: I understand.

I try not to spend as much time on questions.

MR. BATCHELDER: You have been most patient with us.

MR. BODNER: Judge, is there anything you would like us to add to our letter?

THE COURT: Your letter stands on its own and I have tried very hard to parse it out. And I don't think that the courtroom can insulate against the surprises that happen in life. I have no evidence here of any intentional misconduct on anybody's part. I have no evidence that the defense has committed itself to an untenable position before the jury.

I will give you an opportunity to further cross examine the Medical Examiner, if that is your desire.

MR. BATCHELDER: We would also like, your Honor, the ability to cross examine the Crime Scene people who searched the car.

THE COURT: I will permit that as well.

MR. LEVENTHAL: We also would like the opportunity to voir dire this civilian individual, who

[3451]

supposedly finds this bullet, outside the presence of the jury since we haven't had any opportunity, there are certainly no 302s on hand, certainly no discovery on hand. It would at least give us an opportunity to see where he is going before we get before a jury.

THE COURT: Well, I understand. I can't compel him short of a subpoena to talk to you in advance. But the government could facilitate such arrangement.

MR. BODNER: We could — or we have no objection to a voir dire of this individual.

THE COURT: In advance of testimony?

MR. BODNER: In advance of testimony before the jury as to any impropriety by the government. I mean, it shouldn't be sort of a practiced cross-examination of materials, but as far as any inquiries of any impropriety by the government, we have no objection whatsoever of a voir dire along those lines with the lay witness. We

subpoenaed him and we anticipate he will be here to testify tomorrow.

MR. LEVENTHAL: We would like to able to explore the circumstances under which this was recovered.

THE COURT: I understand that. That's what we're talking about. I will provide for that as well.

MR. BODNER: Nothing further for the government, Judge.

THE COURT: That is my ruling.

[3452]

MR. LEVENTHAL: So we are clear, your Honor, is it your ruling now that both the testimony with respect to the bullet being found, the ballistics matching up to the fragments in the head, and the blood and the maggots will all come in?

THE COURT: The blood and the maggots and the findings of the bullet, I will give you an opportunity to voir dire. Obviously, if something unusual comes out on voir dire, I will reconsider.

Is it correct that you have known always that there was blood?

MR. LEVENTHAL: We knew from a review of the Crime Scene, of the forensic photo, the Crime Scene photo of the vehicle and the Crime Scene forensic report of the vehicle that there was blood

on the top of paper in the back seat where the head of the deceased was lying.

Did we have disclosure of the fact that there was blood underneath the carpet and maggots underneath the carpet? I'm sure maggots developed later on, but blood underneath the carpet, no, we had no knowledge of that. It was not contained in any report. Apparently the Crime Scene didn't do any extensive investigation.

THE COURT: I understand. I myself am amazed about how little they dug into.

MR. LEVENTHAL: We are not advised of that. I

[3453]

will be quite honest, your Honor. I would try and impose upon the court to consider leaving that out.

MR. BODNER: Judge, the photographs show blood in the black of the car. Furthermore, it shows the face of the victim.

MR. LEVENTHAL: Not in evidence.

MR. BODNER: It was in discovery. Absolutely covered with blood. Absolutely covered with blood. So two and two equals four.

THE COURT: If there is evidence there was blood two and a half years later, why do you need the maggots?

MR. BODNER: We don't. The only point is there was a smell in the back of the car that led this individual to rip it out.

I will instruct him, other than the voir dire, obviously, but before the jury not to mention the existence of the maggots for what it is worth.

MR. BODNER: I don't know what difference the maggots make to you. I don't think the blood you can avoid.

MR. LEVENTHAL: The blood I have to live with.

THE COURT: I will preclude the maggots if that's of similar concern to you. And you will have an opportunity, in effect, for limited discovery by voir dire outside the presence of the jury of the way in which the bullet was found, and the Crime Scene people.

[3454]

MR. BODNER: Judge, there is one thing I want to put on the record. I informed Mr. Leventhal that in putting together the letter rather quickly, one thing I left out but I did apprise Mr. Leventhal when the Task Force individuals went for the first time to find the car in August of this year and they took out the back seat, they in fact found a surgical glove in the back seat.

We have absolutely no intention of eliciting that or putting that in evidence. Indeed, it is consistent with the — we don't know whether

it was from the EMS, but nevertheless it is consistent with the testimony of Patrick Esposito that he was wearing surgical gloves.

THE COURT: That will not come in.

MR. BODNER: Absolutely not.

MR. LEVENTHAL: The reason I had this discussion with Mr. Bodner prior to coming into the afternoon session, and I didn't raise it because he said he was going to. He is a man of his word. I didn't want it to appear that I was trying to take unfair advantage by saying they didn't do this either.

What I have to say is this, your Honor. In tandem with my entire argument of this, the entire matter of the investigating organization with respect to the disclosure of this material, as well as the manner in which bits and pieces of evidence or bits and pieces of

[3455]

information have been disclosed to the defense in a, what I would certainly say is not with all deliberate speed to any extent of the imagination.

They found a bullet and they say that we don't know whether or not it will match anything.

Eleven days later we learn that it does.

They find a — the investigators tear apart a car a second or third time and they don't bother to let us know that they have done any of that.

They find a surgical glove. True, they don't intend to use it, but they don't bother to let us know about any of that.

MR. BODNER: Which would only corroborate the government's case.

THE COURT: I understand. I understand. We are now getting to the point of diminishing returns.

MR. BATCHELDER: We have one request. We would like to know exactly where the bullet was found in the car.

MR. BODNER: I have actually discussed this with Mr. Leventhal before, but what happened was that, as I understand it, as he was ripping out in the back, he removed the front seat, and as he was ripping the insulation apart —

THE COURT: Are you talking about on the floor?

MR. BODNER: On the back floorboard.

[3456]

Again, we will have the witness for voir dire to nail this down.

My understanding is near the back transmission hump toward the driver's side in the rear of the car, as he was ripping across that insulation, exposing the steel of the floor, he

heard a ping drop out as he was tearing the carpet from that area. He looked down and that's where the bullet was.

THE COURT: You are talking about in front of the back seat?

MR. BODNER: No.

THE COURT: Was it under the back seat?

MR. BODNER: It was in the — again, he didn't see it physically drop from where it dropped out.

THE COURT: He heard it.

Where exactly was that?

MR. BODNER: I think it is better if the witness testifies, but my understanding of where it was was the area of the back seat floor, carpeting behind the driver's side and near the transmission hump in the back.

THE COURT: I understood that, near the transmission hump.

What I'm asking you is how far back — that is, this is an area where the feet sit normally. Is it where the feet would sit or under the back seat?

[3457]

MR. BODNER: I believe it was sort of in between the two.

THE COURT: It is in front of the back seat.

MR. BODNER: Correct. Absolutely correct.

THE COURT: That's all I was trying to visualize.

It is somewhere between the back seat and the front seat.

MR. BODNER: Exactly.

THE COURT: Near the transmission hump.

MR. BODNER: That was the area he was tearing apart. He didn't actually watch it drop out.

THE COURT: I understand. He was pulling out the material.

MR. BATCHELDER: Is it from the pool of blood area?

THE COURT: Where was the blood and the maggots?

MR. BODNER: He was working in the area — he was trying to rip out the insulation in the area where the blood and maggots were because he wanted to get that out in order to get rid of the smell, and he was working in that area.

We have produced the videotape, by the way, that was made after the bullet was found, in some way trying to recreate what happened.

MR. LEVENTHAL: I just want to make one further inquiry and then I will make a request, so the record is clear.

[3458]

First, is there any information with respect to any holes in the carpet or any holes in any part of that area of

the back where this bullet was recovered?

MR. BODNER: Again, that's in the videotape. There was a hole that was found in that area.

MR. LEVENTHAL: That's in the videotape?

What I would specifically request now, since now we are on notice of the facts, we have been on notice but since we have been having this discussion that there was a second or third attempt by investigators to locate a bullet, to search the inside of the vehicle, we would request any and all reports that were prepared by anybody with respect to these actions.

MR. BODNER: Judge, I don't think there are any reports, but we will definitely —

THE COURT: Don't think about it. Find out.

MR. BODNER: What I was going to say, I am not aware of any reports. Let me say it that way. And we will inquire of everyone involved whether any reports were made. And if so, we will produce them.

THE COURT: You will ask everybody to search their files?

MR. BODNER: Absolutely.

THE COURT: I think that is the fairest resolution. And I so rule.

[3459]

MR. LEVENTHAL: Exception.

THE COURT: Of course, you have made your position clear. You don't need an exception under the Federal Rules, as you know.

(Trial adjourned to Thursday, October 7, 1993 at 9:45 a.m.)

UNITED STATES VS. MASSARO

COURT OF APPE. LS ROOM 1705

JUSTICES: JACOBS, ALTIMARI & CALABRIZZI

THURSDAY APRIL 20, 1995

POLLACK: May it please the court, my name is John (?) Pollack and I am appellate counsel for the defendant, appellate Joseph Massaro.

CALABRIZZI: You were not trial counsel?

POLLACK: I was not trial counsel. We regress each of the points raised in the brief today and wish to argue three issues as time before the red light allows. First, we'd like to argue that the trial court erred in refusing to grant the defendant a mistrial.

CALABRIZZI: Now that's the one that interests me and that point is very troublesome to me. Tell me, you know, we all know, they were holding the bullet in their vest pocket. You made, someone made a comment, you know, there's no scientific evidence that connects and the government sits there on their hands. I understand that. There came a time when you did know though about the bullet and we'll get an opportunity to cure it to the extent of a continuance etcetera. Now, why should I remain angry under those circumstances?

POLLACK: Well, I think the test is: Was there substantial prejudice when the government, as you said, Your Honor, "sat on their hands" and it's evident the case is a — pretty clear. Well, the defendant, first of all,

was led down a primrose path. It wasn't clear — the bullet was found before trial, disclosed after the opening, after the defendant who was —

JUSTICE: Committed itself.

POLLACK: Committed itself one way. But they didn't say at that point, hey, this bullet ties your client —

CALABRIZZI: How much time?

POLLACK: Two weeks, Your Honor, and during those two weeks —

CALABRIZZI: Two weeks between what? Two weeks between the time they knew that it tied, that time or two weeks between the time that they found the bullet and the time they —

POLLACK: No. Three weeks between the time they found the bullet prior to trial, immediately prior to trial, and the time that they got the ballistics report which tied everything together, which completed the circle. Intermediate of that. So they found the bullet, five days later, after the opening, they disclosed it. So they knew.

CALABRIZZI: They delayed five days from finding the bullet to telling you that they had a bullet and they were going to do some tests?

POLLACK: Correct.

CALABRIZZI: So, at that point you were on notice that something might happen with respect to that bullet?

POLLACK: That's exactly right, Judge Calabrizzi, and he went forward at that time and examined the crime scene — finished his cross examination of the government's chief witness.

JUSTICE: And you could have — could you have asked for a continuance at that point?

POLLACK: No. We did not.

JUSTICE: I know you didn't —

POLLACK: Not me, the trial —

JUSTICE: The trial lawyer. But could you have asked for a continuance and said, "Look, there's this bullet and we don't know where it's going to come out. It may come out our way, it may come out the other way, but the one thing we don't want to do is go on with the trial based on the absence of a bullet when we know it's there."?

POLLACK: I think he could have and I think the trial judge at some time during that period, or close to the decision, close to the time that the test came back, offered a continuance. There's no question about that —

JUSTICE: All right, Counsel.

POLLACK: — but the milk had been spilled.

JUSTICE: Counsel, Counsel, Counsel. Let's assume I'm terribly upset with the government, which I am, but let's assume that the government understands only one word and that's reversion, not reprimand. Okay, let's assume further anything that you want to say about this case is right. All of

it went to credibility; didn't it? Did it go to the —to anything other than credibility?

POLLACK: It went to — of course it went to credibility. It went to credibility —

JUSTICE: Your argument was that Esposito did the murder himself: correct?

POLLACK: Exactly right.

JUSTICE: Now, how does this relate — how do — how do you connect the opening statement which is, there is no scientific evidence connecting my man with this crime, with the bullet?

POLLACK: Because the scientific evidence and the finding of the bullet so enhances Esposito's credibility that in fact it gives the government a smoking gun and I think that's what counsel was referring to.

ALTIMARI: How does — How does —

POLLACK: There was no splatter, Judge Altimari, there was no blood on the front seat. Here's a man — Esposito had testified that the defendant, Massaro, had carried a bloody body spurting blood upstairs, up the stairs, into a garage, placed it in a car and yet the seat which he claimed Massaro was sitting in, in the car had no blood. He claimed that that second shot that was fired in the car, yet, there was no splatter on the back seat. There was no blood, there was no splatter. This bullet discovered three years — going back three years —

CALABRIZZI: All right. Look, let me — nobody is going to be upset with the three year business

because that was a state problem and I'm not concerned with that. Go ahead, move on.

POLLACK: So they were prejudice in a number of ways. Yes, he had to proceed after he got word that there was a bullet. Do you know that the government's initial letter of disclosure they said —

JUSTICE: I have it from a different problem. I mean, prejudice does not mean that the evidence which was admitted was harmful to the defendant.

POLLACK: Of course.

CALABRIZZI: Now, the presiding judge has asked was it harmful to the defendant that — that isn't what prejudice is. Prejudice has to do with the fact of these four or five days delay, of course, that the delay prejudiced the defendant. Now, what I want to know is why wasn't the bulk of that prejudice met by the trial court when it offered a continuance? When it did all of these things which at the time, your client, not you, neglected to or decided not to go forward.

POLLACK: In other words, what your asking is, what was the substantial prejudice, not did it hurt him. Of course, it hurt him. The substantial prejudice is three fold, Judge Calabrizzi. First, his theory of defense attacking Esposito using the absence of scientific evidence was destroyed. Two, his trial counsel's opening to the jury setting forth there is no scientific evidence

because he was relying on the prior discovery, was destroyed. So the credibility of the counsel in talking to and assessing the jury was destroyed. And three, and perhaps most significant the defense counsel's cross examination of Esposito and the crime scene, and particularly the medical examiner ended up assisting the government because he had no choice. He was locked in to this mode because it was his argument that he pressed the medical examiner, Judge Calabrizzi, as to which bullet came first because — and which bullet came second. Esposito had testified that the — obviously, that the shot in the car came second. There was no scientific evidence to show that. There was no, as I said earlier, no splatter, no blood, no fragmentation, no —

JUSTICE: Counsel, did this testimony take place during the four days between the time that the bullet was discovered and the time they told you of the bullet or did it take place between the time that they told trial counsel, I'm sorry, of the bullet and the time that the bullet was linked scientifically? Did it take place after your client was on notice and could have asked for a continuance and stopped the whole thing?

POLLACK: It was on — It was the latter Judge, but my point is —

JUSTICE: It was the latter?

POLLACK: Certainly it was the latter. It was in that two week period that they were conducting their test. But if you look at the discovery letters which are part of —

JUSTICE: Then wasn't what your client did by not asking for a continuance to create a situation in which he could have it both ways? If it turned out that the scientific evidence showed that this was not a bullet that was linked then he had made all sorts of arguments and he could come in and he could say, "Hey, here's a bullet that supports my argument," and so on. And if instead it turns out as it did, that the bullet was linked, he could come in and say, "Terrible error, mistrial. Go back. Let's start all over again."

POLLACK: I don't think so.

JUSTICE: Why should we create that situation even if the government behaved appallingly — I mean completely with the presiding judge in not letting you know during those four or five days, but why should we worry about what happened after the four or five days?

POLLACK: Well, because I think he had a right to rely on the first letter that the government wrote after disclosing the bullet, that there was no way — that they had been advised by law enforcement experts that there was no way that the bullet could be linked to a particular gun or shell casing. And so he took that risk that the trial judge would have because it wasn't a link

and because it came in late and because if you apply the rule of Stevens in this circuit, and Wicks in (?) circuit, then the judge wouldn't allow this in and when the judge decided to allow it in, then of course, he had to make a mistrial. But he was absolutely committed because of his opening — to a course of action. Otherwise, he might as well have had the — I think — I think the emphasis is being put on the wrong —

JUSTICE: How long was the trial?

POLLACK: The trial was months.

JUSTICE: All right. Now, all of this that we're talking about happened early on.

POLLACK: But it was at the crucial —

JUSTICE: I understand. Except, there came a time when the judge said, "You can have a continuance. You can have this, you can have that." You said, "No. I'm gonna play it, you know, I'll get two cracks at this apple." You see, th: 's what's troubling me.

POLLACK: But we were not the party at fault here. Why —

JUSTICE: You could —

POLLACK: Let me put the shoe on the other foot —

JUSTICE: You could have minimized the culpable conduct on the part of your adversary. You could have done that and still tried the case and got a fair trial.

POLLACK: But let's assume we asked for a continuance.

JUSTICE: Yes.

POLLACK: Let's assume for the moment that the judge gave us a week or two weeks —

JUSTICE: Right.

POLLACK: — as this court suggested in Dewy (phonetic), Kelly or any of those cases. And let's assume further that the result came back as it did.

JUSTICE: Yes.

POLLACK: We're in the same posture, now you got —

JUSTICE: No. You get a jury charge from the judge. The judge looks at the jury and says, "Ladies and gentlemen of the jury," and she says what she says. Whatever has to be said to cure the situation.

POLLACK: But isn't it time for this court to say to the government, as you suggested earlier, "When you do something like this — why couldn't the government say we found this bullet. Let's before defense counsel opens, before we let him go down the guided path, before we suggest any present, why can't we just —

JUSTICE: Your basic argument is that the defense counsel's opening statement was so crucial to the whole defense that the fact that it was made at a time when the government knew that it had a bullet and you did not, was sufficient to be reversible error and

that we should go back to teach the government a lesson.

POLLACK: That's part of it. But it's not just the opening statement. It's a concept that encompasses the defense attorney's credibility. It encompasses the defendant's ability to go forward on a defense that he — this is not a case that started two weeks before.

JUSTICE: As I understand it, the theory of the defense is that nothing the jurors would hear would link your client with the murder of Mr. Fiorita; correct?

POLLACK: But for — but for the testimony of Patrick Esposito.

JUSTICE: Exactly. And by the time you got that bullet, that it can be linked to your client.

POLLACK: But it's linked almost as directly as it can because it so strongly corroborated Esposito, who was shown to be a liar in all other things. Here, in this very instance, in this critical count, the count that blew the maggots in this case, it so bolsters Esposito's testimony as to be as good as direct evidence.

JUSTICE: If the issue is the credibility of a witness not the credibility of counsel, couldn't that have been cured by having the court say to the jury, "Ladies and gentlemen of the jury, if there seems to be some inconsistency on the part of trial counsel, that is due to the government's willful holding back of evidence." You know that the court can say some things if you ask

it which will make the life of the government be darn difficult and make your counsel look good, but that wasn't asked for either.

POLLACK: I agree. I don't think it was our obligation. The court certainly didn't offer to do that kind of a charge and I will certainly stand corrected by my worthy adversaries, but I don't think that was — it certainly would have long way but I don't think it would have undone the terrible damage that occurred. You know, some people say first impressions are lasting impressions. But in the end —

JUSTICE: Your main cross is going to be that the government did something really disgusting that affected the beginning of the argument and that that's enough. That's the beginning of your argument, but that's enough.

POLLACK: I think, Your Honor, if you weigh the criteria set forth in Wicks, and set forth in Stevens and it's cases, I think that you will find that the time has come to say stop doing it.

JUSTICE: I know. I understand your position.

POLLACK: Okay. And I'll read my rebuttal hopefully after my (?)

KELLY: May it please the court, my name is David Kelly. I'm Assistant United States Attorney for the Southern District of New York. I represent the government's appeal as it did at trial before Judge Cedarbaum. There's no question, Your Honor, that there

wasn't any delay. I should have turned that bullet over the moment it was discovered.

JUSTICE: Why didn't you?

KELLY: Your Honor, I have a good excuse. I can explain my thinking, which I don't think carries the debt. It should have been turned over. My thinking at the time, Your Honor, was that this was three years after the incident. There had been several searches of the car conducted since then for forensic evidence. Each one of which was of negative results. The car had changed ownership and our forensic experts, once we found this piece of shrap metal, had said initially that a match could not be made. In view of that it looked as though it was irrelevant to the case and that —

JUSTICE: That's a judgement that somebody else should make, not you.

KELLY: Absolutely, Your Honor, and in retrospect —

JUSTICE: You say you should have — you make it very difficult to become annoyed with you or angry with you only because you bang your chest and say you had culpable, you had culpable (?) and you have a right to do that, banging your chest.

KELLY: That was very —

JUSTICE: This is a terrible, terrible thing that happened here. You cannot play games. A lawsuit, a criminal lawsuit, is not a game. It's a search for the truth.

KELLY: It is, Your Honor, and I —

JUSTICE: Now, please address, having said that, it's not my purpose to embarrass you. Having said that, tell me why, after committing this — what I can only describe as an ogresious act on the part of the government — why this did not commit the defendant to a position or a strategy from which he could no longer retreat?

KELLY: I will direct that. First, Your Honor, I should — I think it's important to note it was ogresious, however, there was no bad faith and in fact at the time it occurred, the defense attorney expressly expressed on the record there was no bad faith by the government.

JUSTICE: You see, there's something on record that's trouble — you know, sort of not clear. There came a time when I think you communicated the bullet to your adversary in an informal way; is that correct?

KELLY: Yes, Your Honor. We discussed it with —

JUSTICE: When was that?

KELLY: I believe, Your Honor, that the opening was on Tuesday, we had this discussion I believe on Friday. It was formally advised by a facsimile letter the following morning, Saturday. What happened was, at that point in the trial the only witness, the key witness, the accomplished witness had testified, Patrick Esposito. He had just begun cross examination at the time that we disclosed it to the defense. The cross examination had gone no farther than of

his prior bad acts and had not yet touched upon anything having to do with the charges in this indictment. Nevertheless, Your Honor, the defendant proceeded with trial for twelve days during which time the accomplice finished his testimony on cross examination, the forensic experts testified, the medical expert testified.

JUSTICE: Then he had made an opening statement?

KELLY: He had, Your Honor. Now, the opening statement is obviously important and he places great weight on that. In the opening statement what he said, in sum, was that there is not one shred of scientific evidence that can match my defendant to this car or to this murder. That statement was as true when I disclosed the bullet as it was at the time he made it. What that bullet did was to corroborate Esposito as did substantial other evidence that he ignores. What he ignores is, is that there is a shell casing in the car. Now, there is testimony by the forensic officer that the shell casing is discharged from a weapon when it's fired. Clearly indicating that there's an enormous possibility that there was a shot fired in the car. In addition, the medical examiner testified that while there was a shot at close range that doesn't mean that the skull or flesh needs to be splattered about the car. Nevertheless, the defendant forged ahead with his argument on cross examination that because there was no splatter —

JUSTICE: Go back to the opening statement, your claim is that there was already evidence of which the defendant was aware which if this bullet would be inconsistent with the opening statement would also have been inconsistent with the opening statement, is that your part?

KELLY: Your Honor, I'm sorry. I'm not sure I understand the question.

JUSTICE: You said that there was a casing, that there was other evidence.

KELLY: Yes, Your Honor.

JUSTICE: Okay. And that the opening statement counsel said, counsel for the defendant said there isn't a shred of scientific evidence linking the defendant to this murder.

KELLY: Yes, Your Honor.

JUSTICE: And are you saying that this other evidence, of which defendant was already aware was scientific evidence linking him to the trial,

JUSTICE: Or if it wasn't the bullet wouldn't do so any more —

KELLY: It was not, Your Honor. The other scientific evidence corroborated Esposito's recap of the murder. The bullet did not draw this defendant to this crime any more than the other evidence.

JUSTICE: Okay.

KELLY: That bullet simply was thrown on to the pile of that evidence which already was there which he knew about which

corroborated Esposito's account. I should also say in response to my adversary concerning Esposito's credibility, Esposito testified as to every key element in this expansive indictment the jury convicted on each and every account and acquitted on one sole predicate. Many of those accounts relied extensively on Esposito. But in addition to the evidence that Esposito contributed to the case concerning the murder there is substantial other evidence. For instance, Mr. Pollack mentioned the fact that Esposito said there was no blood on the front passenger seat. Well, the defendant well knew that there was no blood on the front driver seat where Esposito was, despite the fact that the jury had in front of them the blood-soaked clothes that Esposito was wearing at the time he committed the murder. In addition, Your Honor, there was at the time of the search of the house where the first shot was fired a search conducted and the jury had photographs that clearly shown in the blood, in the blood sills, two sets of foot prints. And moreover, setting aside from any sort of forensic evidence, there was several other witnesses who testified concerning the murder. For instance, a confession by the defendant Massaro to his acting boss at the time of the Luchese crime family that yes, I killed this person. There is two other witnesses who testified that Massaro had stated to them that Fiorita, the victim, had caused him a problem and that in fact he made

threatening statements that would suggest that the killing would be very likely.

JUSTICE: Are you claiming that all this was harmless error? Is that what your saying?

KELLY: What I'm saying, Your Honor, is that there is not substantial prejudice particularly in view of this tactical decision not to try to mitigate any sort of damage that might have been caused by my delayed disclosure. You didn't — you didn't see a continuance in fact, Your Honor, I think it's noteworthy that he said that he would not bring in a notion, he didn't know what might happen with the ballistics.

JUSTICE: But how are we to hold the government to a rule which is as important as this one if we don't do something as dire as reverse? This is the essence of the presiding judge's question when he said, "The government doesn't seem to understand any word except reverse."

KELLY: Your Honor, I think the rules already are in place. If this was a grave violation and there was bad faith, there would be reversal. If this is a Rule 16 case and if this court were to find substantial prejudice, then the issue is reversal and I think that is the appropriate measure in a case where there is substantial prejudice. That is not the case here, Your Honor. I think there is overwhelming evidence that points in the other direction that there was not substantial evidence and I think that it's even increased by his tactical decision not

to go forward. And what I was saying a moment ago concerning the ballistics report, he stated on the record, "Your Honor, I don't need a continuance to the ballistic report because I fully expect it's a foregoing conclusion that, to me, that that ballistic test is gonna come back as a match." So he knew that, yet, ignored it and proceeded with that defense without seeking a continuance, without waiting for the ballistic report. And I think it's very keen of Your Honor's observance that he's seeming to have it both ways. Well, let me try to see what I can do here and I failed and now I'll back up and try to recoup it and come back and say substantial prejudice. I don't think he should be permitted to have it both ways. He was given ample opportunity by Judge Cedarbaum to try to take a closer look, to mitigate any possible prejudice. He chose knowingly not to do that.

JUSTICE: At the trial, how did the defense counsel account for the presence of the shell casing?

KELLY: Essentially, Your Honor, I believe it was something he just tried to ignore, and there was — I believe, Your Honor, I'd have to go back and fully search the record, there may have been some questions on cross examination that suggested that it could have gotten there by falling out of someone's pocket, for instance. The testimony of the forensic officer though was that a bullet, a shell casing like that

typically is discharged upon the firing of a weapon.

JUSTICE: But typically, is it evidence that that shell casing had been chucked off the bullet at the time that it was fired?

KELLY: It's not possible to make a forensic comparison between a particular shell casing and a bullet to say it came from the same casing. There was evidence, however, after ballistics that that shell casing was indeed a certain caliber and that that bullet was likely to be of the same caliber. So it's not a definite match, but one strong suggestion that yes, there was a match.

JUSTICE: The bullet came from a particular gun. Is that gun in any way linked with Mr. Massaro?

KELLY: The gun was never found, Your Honor. Only — what was found was — the fact that his testimony the guns immediately after the shooting was given to an accomplice, Joseph Kern, who had picked up the defendant and Esposito after the murder. So, we never had the gun. What we did have was shell fragments from one wound and then we knew that there was a second wound that had passed through the head and left, exited him. Your Honor, in view of all of this clearly the disclosure, the delay was undue. However, all of the factors, first off that the statement he made during his opening statement was no less true when he made

it than when the disclosure was made. He did not seek to go back and ask to reopen it, he did not seek an instruction, as Judge Calabrizzi suggested might be appropriate by instructing the jury that this was not proper and directed its comment it should not reflect upon the defendant. He did none of that. He proceeded with some of the most crucial witnesses in the case. The accomplice, he went after the discovery of the bullet and cross examined concerning the details of that. He went ahead and cross examined the forensic experts who investigated both scenes, where the body was discovered and where it was allegedly shot. And he went through and cross examined the medical examiner. Never once, never once making one peep about the bullet or when it would be that it might receive the ballistics examination.

JUSTICE: You don't — You don't consider the possibility that counsel who has in a major case planned a whole strategy and is — has begun their strategy is suddenly confronted with the possibility of new evidence of this sort and instead of making a cool and collected tactical judgement, simply makes a mistake at that point not to ask for a continuance because after all it's in the middle of a trial and there's a certain of pressure both ways and then as a result of that what you now concede is the most important evidence in the trial comes in. And that this was a tactic that it was just somebody that got put in a tough situation because of your mistake.

KELLY: That's not the case here, Your Honor. It's not the case because I frankly suggest to you that that defense could not have flown in the face of all the other evidence that corroborated Esposito. The shell casing, the blood in the footsteps, the blood in the car, the testimony of medical examiner concerning splatter and so forth. It just wouldn't have flown. And the bullet that was later recovered was only consistent with that. It wasn't something that threw up a whole new avenue or threw up a whole new face to the case it was consistent with the government's theory that it was — and the other evidence that already was there, was completely inconsistent and refuted the defendant's defense. And I also should suggest to you, Judge, that while this was a lengthy trial indeed, this was not the middle of the trial it was very early on. There was one witness, an organized crime expert who just laid out some general (?) then the accomplice testimony of Esposito and the cross had begun for a very brief period before he concluded for the weekend. Not once, not once touching upon anything having to do with the charges in the indictment. It was very early on, had the defense sought — had the defendant been troubled by the delay, had the defendant thought of some sort of bad faith, surely he would have turned to the judge and cried foul. Not only did he not do it when we resumed on Monday, he did not do it for twelve days, trying to take some sort

of tactical advantage in the meantime. For that reason, coupled with the fact that there's no substantial prejudice we think that Judge Cedarbaum acted properly and well within her discretion by admitting the bullet and denying the defense motion for a mistrial when he made it long down the road. Your Honor, the remaining issues defense has now argued, I will rest on my brief unless there are any questions concerning those briefs.

JUSTICE: Right. Okay. Counsel, tell me why should you have your cake and eat it too?

POLLACK: Well, I think we should have — I don't view it as having our cake and eating it too. First of all, as Mr. Kelly has indicated when he stood up here, he indicated to counsel that there was no way when counsel was initially informed after his opening — he informed that a match could not be made with respect to that bullet. It further exacerbates the problem. If —

JUSTICE: What takes counsel so long to become moved to the point where he moves for mistrial?

POLLACK: Only when that came in, only when in fact it was two weeks later determined that a match indeed could be made that it indeed was gonna come in, then he moved for the mistrial. That was appropriate. How could he move for a mistrial with no —

JUSTICE: The offense took place at the time he knew that the bullet was in possession of the government and that he was about to

connect — that he had statements in opening remarks. That's when the offense took place. There should have been something clear on the record at that point.

POLLACK: He wasn't advised until after —

JUSTICE: Three days later.

JUSTICE: But why wasn't something said then?

POLLACK: Well, I think — I think things were said at that point, he didn't move for a mistrial. He didn't move to exclude the evidence, but of course, I think the trial record will show —

JUSTICE: But why wouldn't he then just have said okay give me a continuance so then we see what happens two weeks later and at that point when it's gonna come in, say now I have to have a mistrial because then the court can decide that question of mistrial early on before Esposito has been there and has been cross examined so that before any of the things are revealed, really.

POLLACK: Hindsight is certainly — 20/20 hindsight is certainly wonderful here, but he was, as Your Honor suggested in questioning Mr. Kelly, in the heat of doing this, he had prepared for three years, he had gone over all the other scientific evidence —

JUSTICE: Do you concede that the government acted in good faith —

POLLACK: They did not. I concede they certainly were not in bad faith. They did not hide this intentionally. But I do suggest, Your Honor,

that had they examined that car on the four or five separate occasions pretrial and never looked for the bullet before, immediately before trial.

JUSTICE: If the issue were one of incompetence it would be a very different question.

POLLACK: When does gross negligence, certainly in a new trial in another context, in a new trial context, gross negligence sometimes rises to the level of bad faith. It certainly does in the (? cases) situation, it certainly does in a (? cases) situation. We don't say that they intentionally did this, but as Your Honor suggested, perhaps gross negligence is involved here and they should be held to a different standard.

JUSTICE: How did the defendant, this defendant, account for the casing?

POLLACK: I'm going to answer Your Honor's question. I think you will find in the summations of counsel that the argument was, if you recall that the first shot Esposito — in the house, Esposito testified, was at close range from behind and I think, Your Honor, in reading the record you will find that defense argued that it fell out of the deceased clothing when he was put in the back seat. And, in fact, the shell casing was found in the back seat, near the passenger seat, near the deceased. Whatever that final comment with respect to the so-called corroboration with confession described by Mr. Kelly that Mr. Massaro made to another was not at all

a confession. What he said was, and this is through another informant, DeArco (phonetic), excuse my language, I'm quoting from the record, "This rat bastard gave me up and then got some evidence, but I got no problems." Hardly a confession, that —

JUSTICE: Counselor, would you characterize the evidence of guilt overwhelming in this case?

POLLACK: Not on this key count.

JUSTICE: No. Take that count out for a moment. Was the balance of this trial overwhelmingly —

POLLACK: Not if one rejects the testimony of Esposito. And it's interesting, Judge, that when the jury was deliberating each time they asked for Esposito — each time they looked at Esposito's testimony they asked for corroborating testimony. Never once did they consider Esposito's testimony alone. So on some counts I would say that the proof here was strong —

JUSTICE: Overwhelming. Overwhelming.

POLLACK: On other counts it was far from overwhelming. For example, on the Tiffany they failed to prove the ****** That's what we ******

AFFIDAVIT OF ROBERT J. KOPEC

I, Robert Kopec, being first duly sworn and cautioned according to law, do hereby state the following under oath, TO WIT:

1. I am a Forensic Scientist in private practice in Winter Park, Florida. I have over 25 years experience in Forensic Science and involvement with many thousands of criminal and civil cases. My practice consists of collecting, evaluating, analyzing, and consulting in the areas of criminalistics, serology, and trace evidence, including microscopic and instrumental analysis, crime scene evaluation, fingerprints, inspection and sampling of evidence, and crime scene reconstruction.

2. I am a partner in Morris-Kopec Forensics, Inc., 7523 Aloma Avenue, Suite 207, Winter Park, Florida 32792. Morris-Kopec Forensics, Inc. is a private laboratory providing laboratory and consulting services to attorneys, industrial corporations, and governmental agencies.

3. I have been qualified to give expert testimony in federal, state, and military courts in virtually every state in the United States and have testified internationally. The Affiant has been employed as a Forensic Scientist-Investigator by numerous governmental agencies including the Bureau of Alcohol, Tobacco, and Firearms, Florida Department of Law Enforcement Crime Laboratory, Oregon State Police Crime Laboratory, Metropolitan Police Department-Washington, DC, and The Seminole County, FL. Sheriffs Department. Affiant is a member in good standing of the American Academy of Forensic Sciences (Fellow), International Association for Identification, American College of Forensic Examiners, Association of Official Analytical Chemists, and the International Association of Bloodstain Pattern Analysts. The Affiant has been educated at the State University of New York- College at Fredonia, SUNY-

College of Agriculture and Technology at Farmingdale, George Washington University, The FBI Scientific Training Division at Quantico, VA, and numerous other institutions in the United States.

4. I have extensive experience in analyzing and evaluating forensic evidence, including hair, blood, firearms, and other types of evidence in criminal cases. I also have extensive training and experience in the evaluation, collection, and preservation of forensic evidence, and in crime scene reconstruction. I have responded to many hundreds of major crime scenes and have been responsible for the collection, preservation, documentation, and laboratory analysis of physical evidence. I have been qualified as a testifying expert in cases involving this type of evidence and have consulted on and assisted attorneys and governmental agencies with the preparation of many cases involving this type of evidence and, in criminal cases, I have testified at the request of both the prosecution and the defense. I have been involved in, or assisted with, numerous capital cases. As a result of my testimony in criminal and civil cases, I am familiar with the evidentiary limitations on expert testimony, standards controlling the proper introduction of scientific evidence, and the degree and extent to which scientific testimony is generally subjected to adversarial scrutiny in the courtroom. See attached curriculum vitae.

5. The affiant has instructed judges, attorneys, police officers, and forensic scientists in the areas of forensic science, criminalistics, evidence and crime scene procedures at numerous colleges and other institutions throughout the United States.

6. The affiant has reviewed numerous police reports, laboratory reports, autopsy reports, statements, photographs, diagrams, and transcripts of trial testimony in the case of the United States v. Joseph Massaro, S1 92 Cr. 529 (MGC).

7. Based upon extensive training and experience involving firearms related crimes and the resulting crime scenes and evidence, in addition to a review of the documentation in the above-cited case, the affiant offers the following discussion and opinions in support of his conclusion that it is unlikely that the shooting that resulted in the death of Mr. Fiorito occurred in the vehicle, and that the physical evidence is inconsistent with the scenario given in the testimony of Mr. Esposito. In essence, Mr. Esposito states that while he was driving a Chevrolet Monte Carlo, Mr. Massaro, who was sitting in the front passenger seat of the vehicle, turned around and discharged a handgun, striking the head of Mr. Fiorito, who was lying in the back seat and floor area.

8. Mr. Esposito states in his testimony, that he and Mr. Massaro attempted to carry the body of Mr. Fiorito up the basement stairs, and that the body kept slipping from his grip because of the large quantity of blood. Mr. Esposito then states that Mr. Massaro threw the body over his shoulder and carried Mr. Fiorito up the stairs. Mr. Esposito repeatedly states that the hands and clothing both himself and Mr. Massaro were heavily bloodstained with Mr. Fiorito's blood. During the crime scene processing of the vehicle by Detectives Ahem and Green, no blood was observed on the front seats or front seat area where Mr. Esposito tested that he and Mr. Massaro were seated in their bloody clothes. No blood was recovered from the doors that they opened, no blood was recovered from the steering wheel or other vehicular controls, and no blood was recovered the interior door handles. It is illogical and unbelievable that two people who are alleged to have blood saturated clothes and hands can put a body in the back seat of a vehicle, get into the vehicle, sit in the front seats, and drive for a period of time, and then exit the vehicle without transferring traces of blood to the vehicle. Clearly the absence of transferred blood in the front seat area of this vehicle is inconsistent with the testimony of Mr. Esposito.

9. Mr. Esposito states that both he and Mr. Massaro were inside the Monte Carlo for an extended period of time after depositing the body of Mr. Fiorito inside. Even though the interior and exterior of this vehicle was processed for the presence of latent fingerprints by Crime Scene Unit Detectives Ahem and Green. Mr. Massaro's fingerprints were not found in or on this vehicle. Even though latent finger or palm prints are not always left at the scene, it would be expected that sticky bloodstained hands would leave latent prints. The absence of bloody latent prints or at least bloody smudges on the passenger side of the vehicle is not consistent with Mr. Esposito's testimony that Mr. Massaro was present in the vehicle with bloody clothing and hands.

10. It is a well documented fact that when a high speed projectile, such as a bullet, enters and subsequently exits the skull, numerous body tissues, such as blood, brain, hair, bone fragments, and scalp tissue are propelled away from the body in the direction of bullet travel. These materials, generally called "high-velocity spatter", or in a general sense "spatter", subsequently land on nearby objects. Occasionally, these same types of tissues, can be ejected out of the entrance wound in the direction of the origin of the bullet. This type of spatter is called "backspatter". It should be noted that these types of phenomena are not to be considered rare, as the scientific literature and the affiant's personal experience, agree that its occurrence is extremely common. Doctor Jacqueline Lee, of the New York City Medical Examiners Office, also testified in this case, that skin, hair, and skull fragments would be projected from the exit wound, which measured one-half inch by five-eights inch (1/2" x 5/8").

During any crime scene investigation, the observation and analysis of these types of spatter can be extremely valuable in reconstructing the events that took place. They can assist in establishing the presence and position of the victim and the assailant at the suspected crime scene. Likewise the

absence of these types of spatter should cause suspicion that the gunshot that caused the victims injury did not occur where the victim was found.

In the instant case, the decedent, Mr. Fiorito, was found in the back seat area of a Chevrolet Monte Carlo with two gunshot wounds to his head. The first occurring of these wounds, as determined by Dr. Lee, entered the left side of Mr. Fiorito's head, passed through his brain, and was retained inside the cranial cavity. The second occurring wound also entered the left side of Mr. Fiorito's head, traveled through his brain, and exited the right side of the skull. An examination of the autopsy photograph of this exit wound appears to reveal missing fragments of tissue from Mr. Fiorito's scalp and hair. Under these conditions skull fragments, blood, scalp tissue, hair, and perhaps brain tissue would be ejected from this exit wound, and perhaps also from the entrance wound, and land at the scene of the shooting. In this case, Detectives Ahern and Green of the NYPD Crime Scene Unit conducted an investigation of the interior of this vehicle. Detective Ahern's trial testimony reflects that he did not observe any spatter, hair, bone fragments, or other types of tissue in the vehicle with the exception of pooled blood on the floor. The vehicle was also searched numerous times by Detective Carbone, and perhaps others, none of which report observing any spatter within the vehicle. This is certainly not the anticipated, logical, or believable result, if the victim, Mr. Fiorito, was shot in the head with a .380 autoloading pistol with jacketed hollow-point ammunition which exited his skull within the vehicle. The absence of high-velocity spatter is inconsistent with Mr. Esposito's testimony that the victim was shot within this vehicle.

11. In this case, Mr. Esposito alleges that the Monte Carlo is the scene of the shooting. This vehicle was searched by Detectives Ahern, Green, and Carbone on numerous

occasions. During his cross examination, Detective Carbone, states that during one of his searches, he pulled up the carpeting approximately three-quarters of the way toward the drivers front seat. It should be considered highly significant that none of these searches revealed the presence of the bullet and bullethole in the carpeting, until they were observed years later by an untrained civilian, Mr. O'Neill. This failure to locate the bullet and bullethole during the numerous searches by trained professional police officers and trained crime scene investigators leads the affiant to regard with serious suspicion the provenance and location of this bullet in the years intervening between the shooting and the discovery of the bullet.

12. An examination of the documents concerning the condition of the two projectiles, that are alleged to have caused the two wounds to Mr. Fiorito, also leads the affiant to a conclusion of serious suspicion in regards to the provenance of the recovered second projectile. The first wound to Mr. Fiorito's head was caused by a projectile that entered the left side of his head, traveled through the brain, and was recovered within the cranial cavity at autopsy as copper jacket fragments and lead core fragments. This projectile appears to be a copper jacketed hollow point bullet similar to the second projectile, and was completely fragmented after passing through one side of the victims' skull. The second wound to Mr. Fiorito's was caused by a projectile that entered the left side of his head, traveled through the brain, and exited through the right side of the victim's skull and scalp. This projectile is then alleged to have passed though the carpeting and insulation of the vehicle, and stopping adjacent to the metal floor of the vehicle. Mr. O'Neill testified that he did not observe a dent or other deformation of the metal or paint as would have been expected. This projectile, when recovered, was found to be only a moderately deformed condition. This bullet, which can be described as a copper jacketed hollow point bullet,

would have been expected to be found in an extremely deformed condition, particularly after passing though both sides of the victim's skull, his brain, and striking the carpeted metal floor of the vehicle. The condition of this projectile, when found, is inconsistent with the wounds and certainly causes the affiant to view the involvement of this particular projectile with great suspicion.

13. The presence or absence of dead maggots under the carpeting of the vehicle, years after the incident, have no bearing or probative value in this case and add nothing to the reconstruction. Flies, and other types of insects, will commonly lay eggs in a food source for their larvae, long after the deposition of the blood, body fluid, or other food source. The only nexus that can be drawn between the presence of the maggots and the victim is the presence of the victims blood on the floor of the vehicle. No conclusion can be reached as to when the eggs were laid. It should be noted that this incident occurred during the winter when flies are not expected to be active in the outdoors in New York.

14. Mr. Esposito states that while he was driving the vehicle, Mr. Massaro turned around, while seated in the front passenger seat, and shot the Mr. Fiorito in the head. This refers to the second shot which is alleged to have passed from left to right and in an upwards direction through Mr. Fiorito's head, exited, and passed through the carpeting before coming to rest on the left (drivers) side of the center hump. When considering the total position of Mr. Fiorito's body with his feet on the floor and midsection on the seat, the affiant is of the opinion that is highly unlikely that a right-handed person can twist around in the passenger front seat, and shoot someone through the head, with the bullet striking the left side of the center hump. Quite simply, the left side of the hump is the opposite or protected side away from the shooter.

15. The position of the victim's body at the time of the shooting is of critical importance in this case. Mr. Esposito alleges that Mr. Fiorito's body was placed in the rear seat area of the Monte Carlo with his feet on the floor behind the front passenger seat, his midsection of the seat, and the head on the drivers side of the rear seat/floor area. Mr. Esposito further states that before finally leaving the vehicle, he reached through the driver- side door and that he moved the victim's body to a sleeping position with limited success. A review of the photographs reveals information that may shed light on the victim's position at the time of the bloodshed. In the photographs taken by Detective Green at the scene, the face and upper torso of Mr. Fiorito are clearly shown. One feature of great importance is that the left side of the victim's face and the left side of the victim's clothing are heavily covered with blood, while the right side of the victim's face is relatively clean except for a few rivulets of blood. It is this affiant's expert opinion that this clearly illustrates that the left side of Mr. Fiorito's head was down at the time of bloodshed and was most probably in close contact with a surface, which was most probably the driver side rear floor where pooled blood was also observed. The great significance of this observation, is that if the left side of the victim's head and face were down, probably against the floor, it would have been virtually impossible for a bullet to have entered the left side of the head and exited on the right side, as the left side of the head would have been clearly protected from gunshot entry by its position. The location of the "bullethole" on the left side of the center hump is inconsistent with Mr. Esposito's version of the shooting.

16. It is the expert opinion and conclusion of the affiant, that it is highly unlikely that the projectile recovered from the automobile is, in truth, connected with the shooting of Mr. Fiorito. A more detailed evaluation of documents, photographs, notes, and reexamination of some of the items of physical evidence, not available to the affiant at this time,

will undoubtedly lead to additional information which can assist the affiant and the court in resolving these issues. An examination and evaluation of the documents already reviewed, clearly indicates to the affiant that "something does not fit". The testimony given by Mr. Esposito that Mr. Massaro turned around and shot Mr. Fiorito within the vehicle "does not fit" the physical evidence; and that some of the physical evidence, the second projectile in particular, "does not fit" in the version of the shooting given by Mr. Esposito. It also appears to the affiant that assumptions were made regarding the physical evidence that may be scientifically insupportable.

17. In summary, It is the expert opinion and conclusion of the affiant, that the testimony of Mr. Esposito regarding the shooting of Mr. Fiorito, is not consistent with the physical evidence in this case.

Submitted under oath by:

/s/ Robert J. Kopec
Robert J. Kopec, Forensic Scientist

JEAN H COLLINS
My Commission CC306596
Expires Aug. 30, 1997
Bonded by HAI
800-422-1555

NOTARY PUBLIC
[SEAL]
STATE OF FLORIDA

Sworn and subscribed to me
on this 21st day of March, 1997
Affiant is personally known to me

/s/ Jean H. Collins

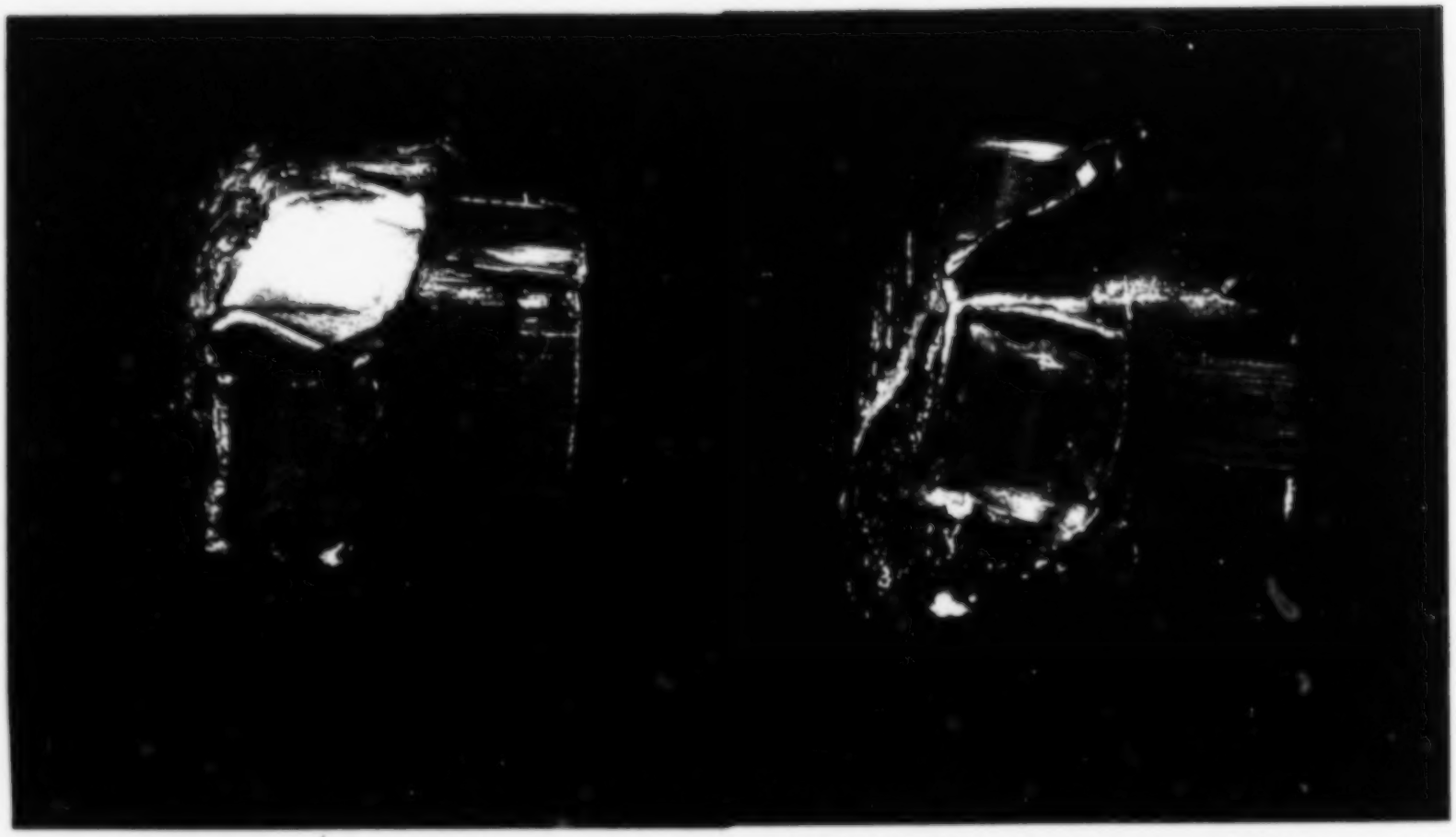
Jean H. Collins
Notary Public
7523 Aloma Ave., Ste. 106
Winter Park, FL 32792

High speed photograph showing spatter effect of projectile passing left to right through simulated skull. Note projected forward spatter to right of target and projected backspatter to left of target.

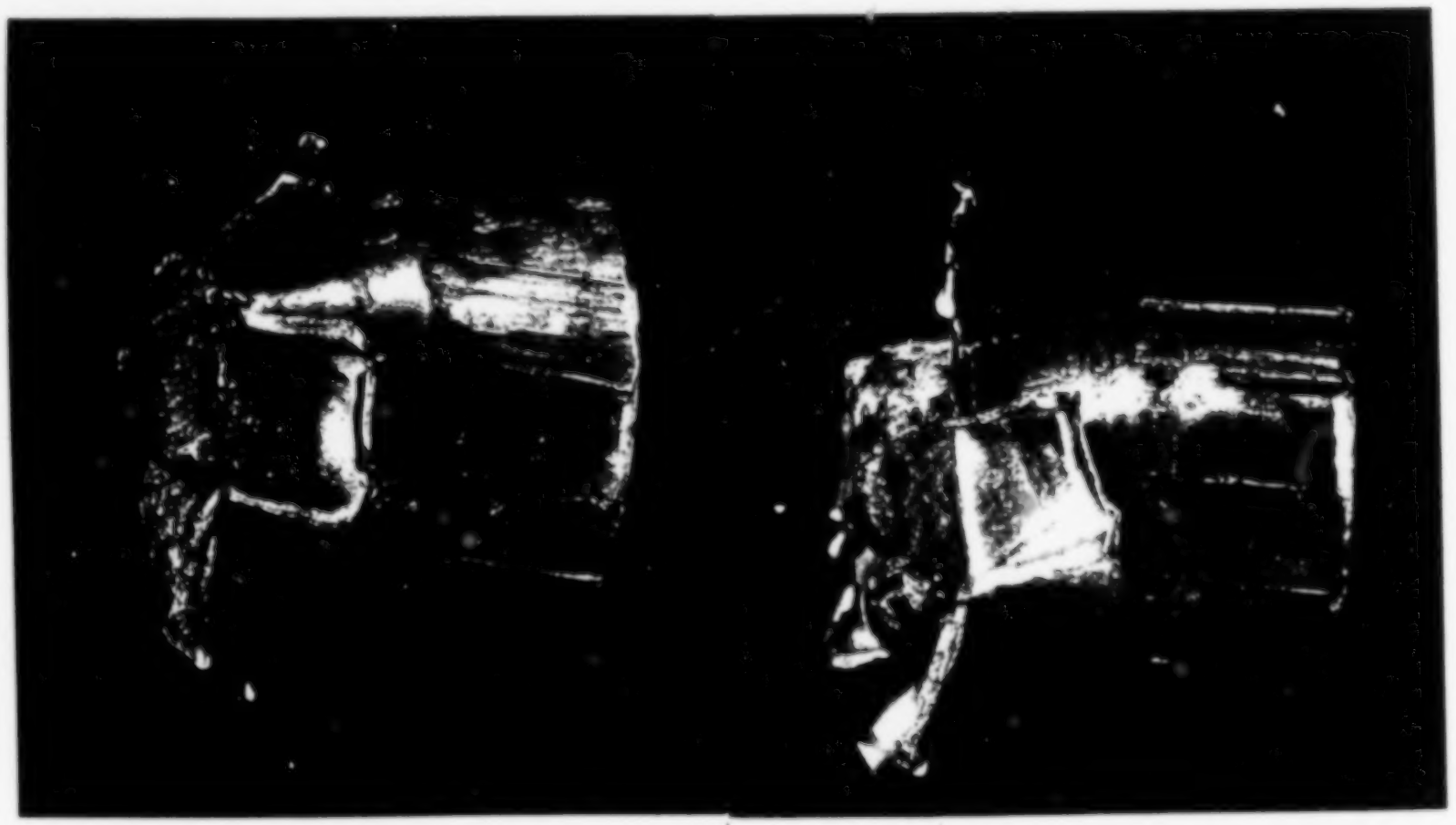
Backspatter and forward spatter patterns produced when blood droplets struck nearby surface as projectile passed through simulated skull in above photograph. Note the large number of blood droplets striking this surface in distinct zones.

Photograph of the projectile recovered by Mr. O'Neill from the Monte Carlo.
Note the degree of deformation and compare to the projectile fragments recovered from the cranial cavity of Mr. Fiorito in the photographs below.

Photographs of the deformed bullet jacket and lead-core fragments
recovered from the cranial cavity of Mr. Fiorito at autopsy.



.380 Auto caliber projectiles from cranial cavity of pig. Note that these projectiles passed through one side of the pig skull and did not exit. Note the degree of deformation in these projectiles. The hollow-point section is completely deformed and fragmented and the copper-jacket is expanded and partially fragmented.



.380 Auto caliber projectiles recovered after striking and passing through simulated fluid-filled tissue,, such as a brain. Note that the hollow-point section and copper-jacket of these projectiles are deformed and partially fragmented.

ROBERT J. KOPEC

Morris-Kopec Forensics Inc.
7523 Aloma Avenue Suite 207
Winter Park, FL 32792
(407) 678-5508

CURRICULUM VITAE

1989–Present	Morris-Kopec Forensics Incorporated, Winter Park, Florida Independent Forensic Consultant
1978–1989	Kopec Forensics Incorporated, Longwood, Florida Independent Forensic Consultant
1980–1989	Seminole County Sheriff's Department, Sanford, Florida Forensic Scientist – Crime Scene Investigator
1978–1980	Florida Department of Law Enforcement Sanford Regional Crime Laboratory, Sanford, Florida Crime Laboratory Analyst Supervisor
1978–1978	Oregon State Police Crime Laboratory, Portland, Oregon Senior Criminalist
1976-1978	Bureau of Alcohol, Tobacco, and Firearms Headquarters Forensic Laboratory, Washington, D.C. Forensic Scientist
1970-1976	Metropolitan Police Department, Washington, D.C. Forensic Scientist – Identification Technician

OTHER EXPERIENCE

Seminole Community College, Adjunct Faculty Instructor
Criminalistics, Forensic Science, Crime Scene Photography, Crime Scene Investigation

Lehigh Valley Community College, Schnecksville, PA
Adjunct Faculty Instructor: Criminalistics, Major Crime Investigation

Florida Department of Law Enforcement, Sanford Regional Crime Laboratory
Assessment and Training Supervisor for Analysts

Bureau of Alcohol, Tobacco, and Firearms,
Headquarters Forensic Laboratory,
Practium supervisor for graduate students from George Washington University, and Northeastern University

ASSOCIATIONS

American Academy of Forensic Sciences (Fellow)
American Board of Forensic Examiners
International Association for Identification
Association of Official Analytical Chemists
International Association of Bloodstain Pattern Analysts

EDUCATION

BS Degree: Earth Science (1969)
State University of New York – College at Fredonia,
Fredonia, New York

Forensic Serology
George Washington University, Washington, DC

Mechanical Technology and Drafting
State University of New York- College of Agriculture and Technology
Farmingdale, New York

FBI Scientific Training Division, Quantico, VA

American Institute of Applied Sciences, Youngsville, NC

Drug Enforcement Administration, Washington, DC

McCrone Research Institute, Chicago, IL

EMV Associates, Rockville, MD

North Carolina State University,

Seminole Community College, Sanford, FL

Valencia Community College, Orlando, FL

Lehigh Valley Community College, Schnecksville, PA

COURT TESTIMONY

Qualified to give expert testimony approximately 1500 times in Federal, State, and military Courts in virtually every state in the United States

SPECIALIZED TRAINING COURSES

FBI Scientific Training Division
Survey of Glass Examinations
Forensic Microscopy of Hair
Forensic Microscopy of Fibers
Fingerprint Classification

George Washington University
Forensic Serology

North Carolina State University
Wood Technology

Drug Enforcement Administration (BNDD)
Drug Identification

Florida Department of Law Enforcement
Forensic Paint and Instrumental Analysis
Supervisory Techniques
Uniform Offense and Arrest Report

American Institute of Applied Science
- Fingerprint Identification
- Firearms Identification
- Criminal Investigation

Metropolitan Police Dept. Washington, DC
- Crime Scene Search School
- Crime Scene Photography
- Advanced Forensic Photography
- Police Training Academy

Valencia Community College
- Arson Detection and Investigation
- Identification of Human Remains
- Blood Stain Pattern Analysis
- Detection of Blood in the Field and Laboratory
- Ochterlony Analysis

Seminole Community College
- Investigation of Crimes Against Persons
- Police Photography
- Crime Scene Investigation
- Crime Scene Photography
- Constitutional Law
- Instructor Techniques
- Effective Presentation Skills

McCrone Research Institute
- Forensic Polarized Light Microscopy
- Advanced Optical and Electron Microscopy

EMV Associates
- Scanning Electron Microscopy
- Energy Dispersive X-Ray Analysis

National Bureau of Standards – Nuclear Reactor Safety and Procedures

SCIENTIFIC PUBLICATIONS

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R.J. TRASORRAS INVESTIGATIONS

P.O. BOX 3037 BRANDON, FL. 33509
FACSIMILE 813-661-0703

Telephone 813-654-2173 OR 800-425-1499
FORMER U.S. SECRET SERVICE AGENT

3/18/97

AFFIDAVIT

My name is Rene J. Trasorras; I am a former Special Agent with the United States Secret Service. I am the owner and chief investigator of R.J. Trasorras Investigations and have operated this agency since 1993. As a former government agent I was trained at the Federal law-enforcement Training Center in Glynco, Georgia, where I successfully graduated with the certification of Criminal Investigator. I received further specialized training in Washington D C, at the U.S. Secret Service Special Agent Training center where upon successful completion each agent is given top secret clearance. During both training schools I received extensive training in criminal investigations and the use of firearms. During my tenure in the Secret Service I was assigned to the Miami Field office and I was assigned to the counterfeit squad where I operated as a major case agent in the Southern District of Florida. During this period I was the case agent on what resulted in the largest single seizure in the history of the Secret Service. That case lead to the arrest of 10 individuals, two of which were categorized by Interpol as terrorists and wanted by the Israeli Mossad. I was assigned to various protective assignments including that of the President and Vice president of the United States; the Pope; and various visiting dignitaries and was involved in countless criminal investigations

Based on my training and experience as an investigator, and based on my review of the "facts" of this case it is my

opinion that the shooting could not have happened as described by the government witness.

Explanation;

Discovery of the bullet:

Once impounded, the subject vehicle should have been thoroughly searched for the projectile. This search should have included the removal of the seats, carpeting, the internal door covers, and headliners. Anything short of this type of search should be viewed as malfeasance. There is no question in my mind that a crime scene search conducted by the NY PD or the FBI would have recovered a bullet had one been in the vehicle. Once the vehicle is released, and the chain of custody is broken, anything found from that point forward is suspect. The chain of custody preserves the evidence, should any exist, in the area or object being searched. Any evidence found after the chain of custody is broken should not be introduced as the possibility of tampering now exists. The validity of this type of evidence should be viewed as tainted and not considered when passing judgement on another when such serious consequences are involved.

Shooting;

A shooting resulting in a through and through head shot would have to result in some form of splatter onto the surface closest to the exit wound. This splatter could consist of blood, hair or skin, skull or brain matter. For there to be a story as the one presented by the government witness one must expect to find some form of this human matter regardless of the amount. Additionally, the governments charting of the trajectory of the bullet that was recovered some 3 years after the initial crime scene search as related by the government witness further dilute the story.

Based on the review of these facts, my training as a criminal investigator and my experience in these types of

cases it is my opinion that the shooting as related by the government witness could not have happened as described, AND Patrick Esposito's testimony must be viewed as perjured.

Rene J. Trasorras

THE ABOVE STATEMENTS ARE TRUTHFUL AND MADE TO THE BEST OF MY KNOWLEDGE.

AFFIANT SIGNATURE /s/ DATE 3-18-97

NOTARY:

GRETCHEN L. SELLERS
/s/ Gretchen L. Sellers
MY COMMISSION CO 377106
EXPIRES JUNE 7, 1998
NOTARY PUBLIC
[SEAL]
STATE OF FLORIDA
[illegible] Notary Public Underwriters

PERSONALLY KNOWN/PRODUCED ID

[illegible] 2/7/97
[illegible] 2/7/**[illegible]**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, vs. JOSEPH MASSARO, Defendant.	)	CASE NO. 92 CR 529 MIRIAM GOLDMAN CEDARBAUM, JUDGE

AFFIDAVIT OF CHARLES V. MORTON

Charles V. Morton, being first duly sworn, and upon his oath, does attest to the following:

1. I am the director of the Forensic Science Division of Forensic Analytical Specialties, Inc., Hayward, CA 94545. I received my Master of Criminology degree in Criminalistics from the University of California, Berkeley in 1971.

2. I am a member of the California Association of Criminalistics, International Wound Ballistics Association, American Academy of Forensic Sciences, and California Association of Crime Laboratory Directors.

3. I was retained by Joseph Massaro to review, examine and test the evidence introduced at his trial in *United States v. Joseph Massaro*, U.S. District Court No. 92CR529 (S.D.N.Y), and specifically that evidence related to the murder of Joseph Fiorito, for the purpose of confirming the existence of material evidence not previously discovered which supports Mr. Massaro's contention that the murder

of Mr. Fiorito did not occur as described at his trial by Patrick Esposito, and that this new evidence might alter the jury's verdict or would probably result in Mr. Massaro's acquittal upon retrial.

4. On October 23 and 24, 1996, I viewed and photographed a number of items of evidence maintained in the custody and possession of the United States Attorney's office in New York City. My access to these exhibits was regulated and restricted by assistant U.S. Attorney David Kelly, and I was prohibited from copying, examining or testing the items viewed and photographed in the detail necessary to resolve questions about this evidence.

5. Based upon my preliminary review of the evidence, it is my opinion that detailed examination of certain items of evidence and photographic records is necessary in order to determine if they support or refute the version of events described by Mr. Patrick Esposito at trial. Specifically, the carpet, bullets and fragments, X-rays and photographic negatives (or images from the negatives scanned onto PhotoCD discs) would need to be examined under laboratory conditions.

It is further my opinion, based on my preliminary examination of the evidence and my review of the testimony at trial, that the government failed to adequately search for evidence and failed to conduct detailed examinations of that evidence, and that this failure prevents a critical assessment of whether or not the evidence establishes the propositions for which it was offered.

6. On October 23 and 24, 1996 I viewed and photographed the following items of evidence maintained in the custody and possession of U.S. Attorneys in New York City:

Item 1: White. "Reebok" brand athletic shoes.

Item 2: "Chess King" labeled jacket.

Item 3: Government Exhibit 93: Black shoulder holster.

Item 4: Government Exhibit 93B: Small black leather holster.

Item 5: Government Exhibit 107: "SC380 Auto" pulled bullet cartridge case and powder.

Item 6: Government Exhibit 107A: Fired bullet Item 1, pt. 380 copper jacketed hollow point.

Item 7: Government Exhibit 23: "FC380 Auto" head-stamped extended cartridge case.

Item 8: Government Exhibit 23A: Copper jacket and lead fragments from body of Joseph Fiorito (Q90-5715).

Item 9: Government Exhibit 26A: Photograph of two entry wounds.

Item 10: Government Exhibit 26B: Photograph of exit wound (#2).

Item 11: Government Exhibits 26H & I: X-ray of head wounds and the bullet fragments.

Item 12: Government Exhibit 108: Video tape: "Sgt. Carbone 9/6/93 round found in auto Fiorito homicide."

In addition to the above items, a large quantity of documents, photographs, videotapes and audiotapes, all Government exhibits, were provided but not examined in detail.

7. Prior to my review and cursory examination of these items of evidence, and in preparation for my review, I reviewed transcripts of the testimony of the following individuals who testified in Mr. Massaro's trial: Ahern, Sgro, Carbone, Kolano, Signorelli, Lee, O'Neill, and Esposito.

8. Also prior to my review of the exhibits, I reviewed the following documents:

A. (6pp):

1. Crime Scene Unit Report (90/2657B; 3/1/91/ 13670: 3/1/91 responded to scene 40 Butterfly Drive; informed V. murdered at this location & driven to 109 Pct. by auto, by perps. 23 photographs listed. (Dets. Carbone/Atkinson).

2. Crime scene unit supp. rpt.: Fingerprints: no readable f.p.s found after processing; Serology: Blood samples collected; Trace evidence: Cig. filter torn from cig. and cig. butt collected; (Dets. Signorelli/Atkinson);

3. Copy of previous page;

4. Crime Scene Unit Diagram of basement room and stairway w/location of collected evid.

5. Crime Scene Unit diagram of 1st floor & collected evidence;

6. Crime Scene Unit diagram of 2nd floor & collected evidence.

B. (5pp):

Same as A.1, 2, 4, 5 & 6.

C. (1p.) Crime Scene Unit form Report (90/2657B, 13670) Dated 9/21/90:

Body diagram form: "x---BW" above left ear. No other entries on diagrams. (same as D2 below)

D. (6pp):

1. Relatively illegible form: Joseph Fiorito illegible entries and list of photographs (Chev. auto) Same as W (original copy)

2. (copy of diagram C above)

3. Diagram: Utopia Pky/65 Ave.; Dec. Auto.

4. Hand written notes of "photos": auto, decedent rear seat etc.; 380 Auto FC B/C B/P Disch. shells G-1, recvd rear passenger side floor, Given to P.O. Digennaro #30163 107 Pet.; Veh. 1958 Chevr 9LL-422 NY 2 Dr. yellow, . . . Dec. Joseph Fiorito.

5. (copy of diagram C above)

6. CSU form 63 AV & Utopia PKW Dec. Gunshot v. @ scene. 12 photos.

E. (4pp):

1. Exam. form: exam Buick Auto lic. 4US-842 Owner Patti Esposito; 9/28/90 0825-1730 Hrs. Recovered knife; took 15 photos; precessed for f.p.s (L-1 to L-5 pos. results); Omni light used inside car with neg. results. (Dets. Luciano/Rinaldi)

2. form: request to process perps. (Patti Esposito) auto.

3. Handwritten note: Perp. Esposito. Patrick 1982 Buick (Note a portion of the upper part of the document appears to have been covered with the handwritten note. The word past is above this note.)

4. Handwritten notes "Photos": "pass. side headlight (sic) tested for blood Neg. Results, photo list, collected knife etc." (info on E.1. above).

F. (17pp):

1. "Autopsy Notes" (handwritten) Joseph Fiorito M.E. #Q90-5715: 30 yrs, 69", 177; tattoos: 2 GSW's left side of head no powder or (smoke?), Abrasion (??) of nose. [Can't read most of notes under injuries or gross diagnosis].

2. Diagram with notations;

3. 3 page typed Autopsy Report Case Q90-5715 Joseph Fiorito (21 Dec 90): clothing and shoes noted; rigor

present; purple, anterior and fixed; predom. over lower extremities;

Entrance GSW to head: left parietal≈2.5"; TOH: 5" Left of Ant. ML., 1/8th inch round hole. 1/16th inch rim of abrasion, no powder or soot deposition, from cutaneous wound through skull (1/4" inwardly beveled defect . . . terminates in occipital fossa where deformed fragments of jacket and large cal. bullet are recovered. TRAJECTORY: L→R, [unknown symbol], backward, inj. skull & brain, minimal subdural hemorrhage.

Entrance GSW of Left Temple: ≈5" [unknown symbol] TOH and 6" to left of ant. ML. 3/8th inch rounded defect, with 1/16th" rim of abras.. No powder or soot. Proceeds through middle cerebral fossa grazing horizontal portion of temporal bone, inf. aspect of temporal lobes, terminates right parietal-occipital area ≈4" [unknown symbol] TOH & 7" to right of ant. ML through a 1/2" X 5/8" split exit. TRAJECTORY: L→R, sl backward. No projectile found. Over bridge of nose: 1/2" irreg. purple abrasion, over crease of neck are purple areas of discoloration consistent with post-mortem denudation and pressure point.

4. (1p) C.M.E. Lab. Report Q90-5715 (10/31/90): no blood on knife (Item 1) from Defendant's car (analyst Tracey Fraser);

5. Office of C.M.E. City of NY Q90-5715 Police Ident. of Body form: Fiorito, Joseph: D.O.A. in Auto; Body head down behind driver's seat in rear, legs up on rear seat - homicide. (Officer DiGennaro);

6. (1p) (copy of F4 above);

7. (1p) C.M.E. Identification of Body Report Q90-5715 (9/21/90) (signed) by John Fiorito.

8. (1p) C.M.E. Toxicology Lab Report Q90-5715 (10/1/90): No drugs or alcohol detected. (Dir. of Lab. Marina Stajic);

9. (2pp) C.M.E. Lab. Report Q90-5715 (9/26/90): (Analyst Tracey Fraser): Blood typing results:

Blood detected on sneakers, jacket and jeans from "dumpster opposite Union Blvd. Forest Green Apt." could have come from (v) J. Fiorito (EsD, PGM & sub); no blood: underpants, sweater, socks.

10. (1p) City of NY P.D. Receipt for Autopsy *Evidence: 2pcs. of Def. lead frags.: 1 pc. def. c[illegible]*, (ident. marks "F.J", 9/26/90≈1130 hrs. from Dr. Jean to Det. Sgro, Ballistics squad).

11. (1p) Medical Certificate of Death Joseph Fiorito;

12. (1p) Certificate of Death (no name on form);

13. (2pp) C.M.E. Lab. Report Q90-5715 (10/31/90): (Analyst Tracey Fraser): Human blood detected on garage floor; basement steps, plastic bag from floor and carpet from den floor; Garage floor and basement steps blood could have come from Joseph Fiorito (EsD & PGM sub).

G. (2pp) Duplicates of F.1 and F.2 above;

H. (1p) Duplicate of F.5 above;

I. (1p) Duplicate of F.8 above;

J. (1p) Duplicate of F.7 above;

K. (1p) Duplicate of F.10 above;

L. (3pp) FBI DNA Report dated Feb. 23, 1993 (No copy of the original submission letter has been provided so the identifying numbers in the report can not be related to their sources, however, the items described appear to be those in F.9 above (Items from Dumpster opposite Union Blvd. Forest Green Apt.) and F.13 from 40 Butterfly Drive scene:

Blood which "matches" Joseph Fiorito (loci: D2S44, D17S79, D1S7, D4S139) found on following items:

Q16 (5) Cutting from inside front of jacket;
Q22 (13) Blood from garage floor;
Q23 (14) Blood from garage;
Q24 (15) Cutting from carpet;
(profile ≈ 1:150,000 blacks & caucasian; 1:40,000 Hispanic);
Q21 (12) Blood from basement steps; showed matching loci @ D 17S79 & D4S139.

No interpretable DNA for:

Q13 (2) right sneaker;
Q19 (9) right front leg of jeans;
Q20 (10) left pocket of jeans.

M. Duplicate of FBI Report L. above.

N. (3pp) Cover letter dated September 27, 1993 from U.S. Attorney regarding NYPD Ballistics Lab worksheet regarding .380 bullet and bullet fragment comparison. (Evidence will be made available to the defense.)

Ballistics worksheet:

A. .380 auto FC shell from scene 9/22/90;
B. 2 lead frags-6 & 8 gr? from dec. 9/26/90;
C. 1 piece of deformed Cu jacket 15.1gr? R? from dec. 9/26/93;
D. .380 cal. deformed Cu jktd HP bullet 89.0 (gr.?) R-6(?) 9/24/93.

**Items C & D fired from one gun 9/24/93 Rs

Xerographic **[illegible]** copy of photograph of ballistics evid.-appears to be nose of bullet: Item D, Government Exh. 107A.

O. (3pp) March 16, 1994 Letter form Mr. Batchelder to U.S. Attorney re: condition of maggots from under carpet and letter of response dated March 22, 1994:

> Maggots under carpeting in rear of Fiorito's car when they were discovered in the summer of 1993 - investigating officer indicates they were "very" dead.

P. (6pp) Handwritten notes:

> 2 pages listing photos 1-26 at 40 Butterfly Dr.
> 1 page Serology (Items A-1 through A-6) Evid. to Det. Carbone
> 3pp rough sketches rooms (basement, gr. fl. and top fl.).

Q. (5pp) Duplicates of pages A.1, A.2, A.4, A.5 & A.6.

R (4pp) Duplicates of pages D.3, D.4, D.2 & D.6.

S. (1p) Letter dated July 11, 1994 from Mr. Batchelder to Joseph Quirk:

> Submission of materials (reports, transcripts) regarding ballistic evidence to Mr. Quirk.

T. (5pp) Typewritten transcript of conversation between Bob Chuchinella (phonetic) and Robert O'Neill May 1, 1994 (not all of conversation included due to poor audio). Found bullet under rug - in back - took it out. [Behind driver's seat - between insulation and rug] Maggots were black - they had searched car previously - picked up carpet - did not find bullet at that time - I was going to cut this whole section of rug and throw it out - saw it fall out.

U. (3pp) Duplicate (legible) of pages D1, D2, D3 - diagram of streets, placement of auto at crime scene.

V. (3pp) Exact duplicate of U (except order of pages changed), i.e., Dl, D2, D3.

W. (1p) Original carbon copy, same as D1 (forensic report listing photos, fingerprints and ballistics).

X. (2pp) Duplicate of F13 (some passages underlined on this copy).

Y. (1p) Duplicate of F6.

Z. (2pp) Duplicate of F9

AA. (1p) Duplicate of F4.

BB. (2pp) Duplicate of F13.

CC. (1p) Duplicate of F11

DD. (1p) Duplicate of F12.

EE. (6pp) Duplicate of A1 thru A6.

FF. (6pp) Typewritten transcript of telephone conversation between Bob Chuchinella (phonetic) and Pugsley, 5/21/94. Lisa's car - there was a lot of blood in it - pretty bad odor, had to shampoo a couple of times @ detail shop. Stains were pretty bad in the back. It was just bad fingerprint dust all over everything, console, dashboard, armrest, white powder all over dashboard and seats. Latex gloves left in car dissolved in seats.

9. Finally, I reviewed a series of photographs as follows:

23 (8" x 10" color) Crime Scene unit labeled photographs corresponding to photographs listed in "Crime Scene Unit" Report 3/1/91 by Det. Atkinson. These show scene at 40 Butterfly Drive (see "A" above).

15 (8" x 10" color) photographs with Orange Crime Scene Unit labels marked: "Run NO 90/2657 A" - showing a two tone Buick 4 Door with license New York 4US-842 and a knife and sheath. (one of the knife photographs has a "Defendant's Exhibit A (ID)" label on it. [see E, above].

9 (8" x 10" color) photographs with Orange Crime Scene Unit labels marked "Run No 90/2657". These show a white Chevrolet 2 Door with maroon interior (2) street scenes (2), victim on concrete (1) and victim in Chevrolet behind front

seats (4). These appear to correspond to the photographs in the Forensic Report dated 9-21-90 by Dte.(*sic*) Green 3289 and Det. Ahern. This report lists 12 photographs and this group of 9 appears to correspond to photographs numbered 1,2,3,4,5,6,7,8 and 12. Photographs 9, 10 and 11 have not been received. (see W above).

2 (8" x 10" Black and White) photographs of male victim's head with apparent bullet hole in head. Based on review of the autopsy report (see F, above) one of these photographs shows the two entry wounds on the left side of the head. The other photograph shows a shaved area of the head and an apparent exit wound which appears to be over the left ear. It does not show the two apparent entry wounds on the left side of the head shown in the previous photograph. Based on the first photograph and the autopsy report it is apparent that this photograph has been reversed and actually shows the exit wound over the right ear.

10. Based on my review of evidence, exhibits and trial testimony, I have reached the following tentative conclusions:

My review of the documentation and evidence up to this point has raised serious questions about the validity of this evidence and its ability to support or refute the statements of Mr. Esposito. The initial and subsequent, presumably detailed, examinations of the vehicle by police investigators did not reveal the bullet or the hole in the carpet which was subsequently reported by Mr. O'Neill. No attempt was made to adequately document the condition of the hole in the carpet or to test it to determine if, in fact, it was a bullet hole consistent with the .380 auto cartridge case and bullet found in this case. In addition, as shown in the videotape (Exhibit 108), an apparent pen was placed through the hole potentially destroying evidence which would allow a determination to be made about the source of this hole. No. attempt was made to test blood or tissue residues on the

bullet, as shown in photographs, to determine if it was consistent with being from the victim. In sum, I am able to say that failure to find and properly analyze certain items of evidence creates a significant doubt as to the reliability of the forensic evidence belatedly produced at trial.

11. As recounted above, my inability to answer the questions raised by the initial failure to find the bullet hole in the carpet, resulted from the failure to make available the carpet from the vehicle and the requirement that evidence be examined under restricted conditions in a non-laboratory setting. I would, therefore, support the defendant's request that the court order discovery of the appropriate items of evidence and photographic negatives and require that the opportunity be made to examine this evidence in the necessary laboratory facility. This would allow me to determine if the evidence available is adequate to answer the questions raised and to answer them where possible.

Further Affiant sayeth naught.

DATED this _____ day of _____, 1997.

_____
Charles V. Morton

STATE OF CALIFORNIA)
CITY OF OAKLAND) SS:
COUNTY OF)

Subscribed and sworn to before me this _____ day of _____, 1997.

My commission expires:

_____

(Seal)

_____
NOTARY PUBLIC

JA107

[seal]

U.S. Department Justice

United States Attorney
Southern District of New York

One Saint Andrew's Plaza
New York, New York 10007

September 11, 1993

By Hand
Harry C. Batchelder, esq.
123 William Street
New York, New York 10038

Re: United States v. Joseph Massaro
S1 92 Cr. 529 (MGC)

Dear Mr. Batchelder:

Please be advised that on September 6, 1993, a bullet was recovered from under the carpet in the rear area of the white Monte Carlo in which the body of Joseph Fiorito was discovered on September 21, 1991. The bullet has been submitted to the NYPD laboratory for tests and will be available for your examination shortly. In addition a video recording, demonstrating where in the vehicle the bullet was recovered and the hole that it caused in the carpet of the car is available for your inspection in the United States Attorney's Office. We will advise you promptly if the Government intends to offer either the video or bullet in its case-in-chief.

Very truly yours,

MARY JO WHITE
United States Attorney

By: /s/ David N. Kelley
DAVID N. KELLEY
Assistant United States Attorney
Tel.: (212) 791-9273

By: /s/ Randall W. Bodner
RANDALL W. BODNER
Assistant United States Attorney
Tel.: (212) 791-9275

cc: Honorable Miriam Goldman Cedarbaum

JA110

[seal] U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

September 24, 1993

By Facsimile
Harry C. Batchelder, Jr., Esq.
123 William Street
New York, New York 10038

Re: United States v. Joseph Massaro
S1 92 Cr. 529 (MGC)

Dear Mr. Batchelder:

Please be advised that I was informed this mornin**[text cut off in original]** the NYPD Ballistics Laboratory has determined that the bulle**[text cut off in original]** was recovered from Fiorito's car matches the shell fragments **[text cut off in original]** from Fiorito's head, that is, the two bullets were fired fr**[text cut off in original]** same .380 caliber handgun. I will provide you with a copy **[text cut off in original]** the Laboratory worksheet when I receive it this afternoon.

Very truly yours,

MARY JO WHITE
United States Attorney

By: /s/ David N. Kelley
DAVID N. KELLEY
Assistant United States Attorney
Tel.: (212) 791-9273

cc: Honorable Miriam Goldman Cedarbaum

HADDON, MORGAN & FOREMAN, P.C.
ATTORNEYS-AT-LAW

Harold A. Haddon
Lee D. Foreman
Norman R. Mueller
Saskia A. Jordan
Rachel A. Bellis
Ty Gee
Pamela Robillard Mackey

150 East Tenth Avenue
Denver, Colorado 80203
Telephone 303-831-7364
Telecopier 303-832-2628

Bryan Morgan, Of Counsel
Michael E. Tigar, Of Counsel
(Admitted in DC & NY,
not admitted in CO)

July 25, 1996

David Kelly, Esq.
Office of the U. S. Attorney for the Southern District
of New York
One Saint Andrews Plaza
New York, NY 10007

Re: United States v. Joseph Massaro, District Court Case # 92-CR-529, S.D.N.Y.

Dear Mr. Kelly:

I have been retained by Mr. Joseph Massaro to review the evidence and proceedings leading to his conviction in the above-captioned case, in anticipation of presenting post-appeal motions on his behalf in the District Court for the Southern District of New York. I have retained the services of a forensic expert, Mr. Charles Morton, who will require access to all of the physical evidence and exhibits and a reasonable opportunity to conduct independent analysis and testing of the evidence in this case.

It is my understanding that the physical evidence and exhibits are now in the possession of your office. I ask your assistance in making these materials available to Mr. Morton and those working with him for examination and, if required, for independent testing at your own labs or at another local facility.

Please contact me at your earliest convenience so that the necessary arrangements can be made.

Sincerely,

/s/ Michael E. Tigar
Michael E. Tigar

MET/ss

HADDON, MORGAN & FOREMAN, P.C.
ATTORNEYS-AT-LAW

Harold A. Haddon
Lee D. Foreman
Norman R. Mueller
Saskia A. Jordan
Rachel A. Bellis
Ty Gee
Pamela Robillard Mackey

150 East Tenth Avenue
Denver, Colorado 80203
Telephone 303-831-7364
Telecopier 303-832-2628

Bryan Morgan, Of Counsel
Michael E. Tigar, Of Counsel
(Admitted in DC & NY,
not admitted in CO)

August 8, 1996

David Kelly, Esq.
Office of the U. S. Attorney for the Southern District
of New York
One Saint Andrews Plaza
New York, NY 10007

Re: **United States v. Joseph Massaro, District Court Case # 92-CR-529, S.D.N.Y.**

Dear Mr. Kelly:

As you have not responded to my letter to you dated July 25, 1996, I write again to request that you contact me promptly and confirm arrangements which will enable my forensic expert, Mr. Charles Morton, to examine and test the physical evidence and exhibits in Mr. Massaro's case.

I am sure you are aware that where post-appeal motions are concerned, time is always of the essence. Every delay in making the evidence available to my expert and those working with him impedes my efforts on behalf of my client in this case. I await your call.

Sincerely,

/s/ Michael E. Tigar
Michael E. Tigar

MET:jb

cc: Judge Miriam Goldman Cedarbaum
Joseph Massaro

HADDON, MORGAN & FOREMAN, P.C.
ATTORNEYS-AT-LAW

Harold A. Haddon
Lee D. Foreman
Norman R. Mueller
Saskia A. Jordan
Rachel A. Bellis
Ty Gee
Pamela Robillard Mackey

150 East Tenth Avenue
Denver, Colorado 80203
Telephone 303-831-7364
Telecopier 303-832-2628

Bryan Morgan, Of Counsel
Michael E. Tigar, Of Counsel
(Admitted in DC & NY,
not admitted in CO)

October 2, 1996

David Kelly, Esq.
Office of the U. S. Attorney for the Southern District
of New York
One Saint Andrews Plaza
New York, NY 10007

Re: **United States v. Joseph Massaro, District Court Case # 92-CR-529, S.D.N.Y.**

Dear Mr. Kelly:

I am writing to confirm our scheduling of the review, examination and testing of exhibits in the above-captioned case by Mr. Massaro's expert, as first requested by Mr. Massaro in a letter addressed to you on July 25.

You agreed on September 30, 1996, that the exhibits and physical evidence would be available to Mr. Massaro's expert on October 21, 1996 and throughout the week. As the expert, Charles Morton, will be traveling to New York for the express purpose of evaluating the evidence from Mr. Massaro's case, please let me know at your earliest

convenience exactly where the examination will take place so that the necessary arrangements can be made.

At present, and as Rachel Bellis told your assistant on September 30, the only portion of your closed case file that Mr. Morton requires (in addition to the evidence and exhibits themselves) are the exhibit lists compiled by the prosecution and defense and filed with the court. Should Mr. Morton advise that he needs any other materials from the file, we will inform you promptly.

Sincerely yours,

/s/ Michael E. Tigar
Michael E. Tigar

cc: Judge Miriam Goldman Cedarbaum
Joseph Massarro
Charles Morton

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, vs. JOSEPH MASSARO, Defendant.	)	CASE NO. 92 CR 529 MIRIAM GOLDMAN CEDARBAUM, JUDGE

AFFIDAVIT OF ERIC KUSKE

Eric Kuske, being first duly sworn, and upon his oath, does attest to the following:

1. I am a 1996 graduate of the University of Kansas School of Law. During 1995 and 1996, I assisted professor Stephen McAllister of the University of Kansas School of Law in the investigation of post-trial and post-conviction motions for Joseph Massaro. Mr. Massaro was tried and convicted in 1993 in U.S. District Court No. 92 CR 529 (S.D.N.Y.).

2. In 1995 and 1996, I attempted to locate a complete psychological profile of Alfonse D'Arco, one of the Government's primary witnesses against Mr. Massaro at trial. At and before the time of his testimony, Mr. D'Arco had been accepted into the Federal Witness Protection Program, and my research revealed that psychological profiling of all witnesses in the Witness Protection Program was required by Department of Justice regulation. Seeking Mr. D'Arco's psychological profile, I filed a Freedom of Information Act request with the Department of Justice on July 7, 1995.

3. In September 1995, I telephoned David Kelley, Assistant United States Attorney for the Southern District of New York and the Chief Prosecutor in the *Massaro* trial. In that conversation, I requested the complete psychological profile of Alfonse D'Arco. During that phone conversation Mr. Kelley stated that a psychological profile was not done on Mr. D'Arco prior to his acceptance into the Witness Protection Program or before Mr. Massaro's trial. He also advised a psychological profile had not been done since the trial. Mr. Kelley stated that as Mr. D'Arco's sponsor in the Witness Protection Program, he would be aware if and when such a profile was done.

4. On September 11, 1995, I wrote to Assistant U.S. Attorney Kelley and requested that he either provide me with Mr. D'Arco's complete psychological profile or confirm its non-existence. I further informed him that time was an issue for Mr. Massaro and that I would appreciate a response at his earliest convenience.

5. On September 14, 1995, I wrote again to the Department of Justice to renew my Freedom of Information Act Request of July 7. I requested a copy of the complete psychological profile of Alfonse D'Arco or, alternatively, confirmation that such profile did not exist. I informed the Department of Justice that time was of the essence and that I would appreciate a prompt response.

6. Shortly after January 2, 1996, I received a copy of a letter written by Assistant U.S. Attorney Kelley on January 2 to Steve McAllister, the law school professor with whom I was working on Mr. Massaro's behalf. In that letter, Mr. Kelley contradicted his earlier statement to me that a psychological profile was not compiled for Mr. D'Arco. Mr. Kelley stated that an evaluation of Mr. D'Arco was completed in 1991. In his letter, Mr. Kelley refused to provide Mr. McAllister with a copy of this report.

7. I also assisted Mr. Massaro's lawyers in their efforts to obtain access to the evidence and exhibits collected by the Government in its investigation of Mr. Massaro's case, so that this evidence might be examined by an expert retained by Mr. Massaro in support of Mr. Massaro's post-conviction motions. I am aware that between January and October, 1996, assistant U.S. Attorney Kelley was contacted by attorney Michael Tigar and members of his office, acting on Mr. Massaro's behalf, to arrange a convenient time for Mr. Massaro's forensic expert, Charles V. Morton, to examine and test the evidence in the Government's custody. I am aware that on September 30, 1996, Mr. Kelley agreed that the evidence would be available for Mr. Morton to examine and test during the week of October 21, 1996. I am also aware that Mr. Kelley subsequently told Mr. Tigar that Mr. Morton's review of the evidence would be limited and that he could only see the evidence on one day, October 23. I am aware that Mr. Kelley subsequently agreed to make the evidence available for an additional day if that was required.

8. On Wednesday, October 23, I accompanied Charles V. Morton and attorney James Froccaro, both of whom were retained by Mr. Massaro, for their review of the evidence at the Office of the United States Attorney in Manhattan. Mr. Kelley was not present. Shelly Clark, an assistant investigator informed us that Mr. Kelley had instructed that we be prohibited from opening any plastic envelope containing evidence and that we could not take photographs of any evidence. When we protested, Ms. Clark contacted Mr. Kelley in Washington, D.C. Mr. Kelley then informed us that we could photograph but not unseal any evidence.

9. During the course of our examination, we discovered a number of photographs and other items were missing. We asked Ms. Clark to provide us with the missing photographs, the piece of carpet with purported bullet hole, which was removed from Mr. Fiorito's car, parts of Fiorito's jacket,

crime scene negatives, Mr. Massaro's shoes, and other evidence. We also requested a light box with which to review X-rays, a VCR to review the crime scene video and a tape recorder to review audio tapes. Ms. Clark agreed to attempt to locate these items.

10. On August 24, Mr. Morton and I returned to the U.S. Attorney's office and met again with Ms. Clark. Ms. Clark supplied us with a light box, VCR and tape recorder. She did not provide us with the negatives, carpet, or parts of Fiorito's jacket. We still were prohibited from opening the plastic envelopes containing evidence. When I protested, Assistant U.S. Attorney Kelley was called. When he appeared, he demanded to know Mr. Massaro's legal arguments before he would consider letting us do any experiments or examinations of the evidence. He characterized the evidence as "his evidence."

11. After heated discussion, Mr. Kelley allowed me open the envelopes, and Mr. Morton was permitted to examine bullets and fragments to photograph them. Only after I emphasized our need for the fragments of Fiorito's jacket did Mr. Kelley retrieve those items for us, and Mr. Morton examined and photographed that evidence. Mr. Kelley said he had no idea where the carpet or negatives were, but he agreed to continue looking for them.

12. Mr. Kelley would not allow Mr. Morton to take the evidence to a laboratory for proper examination. Mr. Kelley demanded that we list the evidence we want and explain what we plan to do with it; he stated that once he received this information, he would decide whether he would allow us to examine the evidence.

13. To my knowledge, Mr. Kelley has not contacted any lawyer or expert working for Mr. Massaro to advise that he has located the carpet, crime scene negatives, shoes or any other missing evidence.

Further Affiant sayeth naught.

Date: _____

_____
ERIC KUSKE

STATE OF FLORIDA)
CITY OF) SS:
COUNTY OF)

Subscribed and sworn to before me this _____ day of _____, 1997.

My commission expires: _____.

(Seal)

_____
NOTARY PUBLIC

(6)

Supreme Court, U.S.
FILED
NOV 14 200

No. 01-1559

In the

Supreme Court of the United States

JOSEPH MASSARO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

HERALD PRICE FAHRINGER*
ERICA T. DUBNO
LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY
& CAMBRIA LLP
780 Third Avenue, 32nd Floor
New York, NY 10017
(212) 319-5351

Counsel for Petitioner

* *Counsel of Record*

Of Counsel:
EUGENE GRESSMAN
Univ. of North Carolina
School of Law
Campus Box #3380
Chapel Hill, NC 27599
(919) 962-3688

NOVEMBER 14, 2002

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QUESTION PRESENTED

Whether a federal criminal defendant, whose new appellate counsel fails to raise a claim of ineffective assistance of trial counsel on direct appeal, is procedurally barred from asserting that constitutional claim in a habeas corpus proceeding brought pursuant to 28 U.S.C. § 2255.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF FACTS	2
A. The Fiorito Homicide	3
B. The Trial and the Prosecution's Belated Disclosure of the Bullet	5
C. The Trial Judge Repeatedly Encouraged Defense Counsel to Adjourn the Proceedings to Investigate the Bullet Evidence	7
D. The Direct Appeal	10
E. Trial Counsel's Ineffectiveness is Raised in a Motion Pursuant to 28 U.S.C. § 2255	11
F. The District Court and Second Circuit Find That the Ineffectiveness Claim is Procedurally Barred Because It Was Not Raised on Direct Appeal	13
SUMMARY OF ARGUMENT	15

ARGUMENT	20
I. Federal Criminal Defendants Should Not Be Procedurally Barred from Challenging Trial Counsel's Effectiveness in a Collateral Proceeding	21
II. The Second Circuit's Procedure	24
III. The Cause and Actual Prejudice Exception Should Not Be Applied to Ineffective Assistance Claims	28
IV. The Deprivation of a Defendant's Right to Judicial Review of a Constitutional Question Requires Uniform Resolution	29
V. Petitioner's Ineffectiveness Claim Was Not Based Solely on the Record Developed at Trial and the Facts of This Case Lead to the Inevitable Conclusion That Judicial Review is Required of this Claim	32
CONCLUSION	36

TABLE OF AUTHORITIES

Page(s)

Cases:

Billy-Eko v. United States,
509 U.S. 901 (1993) 23

Billy-Eko v. United States,
8 F.3d 111 (2d Cir. 1993) 15, 24, 26, 36

Bloomer v. United States,
162 F.3d 187 (2d Cir. 1998) 33

Chappell v. United States,
494 U.S. 1075 (1990) 23, 30

Coleman v. Alabama,
377 U.S. 129 (1964) 36

Diaz-Albertini v. United States,
498 U.S. 1061 (1991) 23

Dickerson v. United States,
530 U.S. 428 (2000) 15, 31

Douglas v. United States,
13 F.3d 43 (2d Cir. 1993) 24

English v. Cody,
146 F.3d 1257 (1998) 25

Firestone Tire & Rubber Co. v. Risjord,
449 U.S. 368 (1981) 31

Geders v. United States,
425 U.S. 80 (1986) 33

Gideon v. Wainwright,
372 U.S. 335 (1963) 20

Guinan v. United States,
6 F.3d 468 (7th Cir. 1993) 24, 27

Johnson v. Zerbst,
304 U.S. 458 (1938) 20

Kimmelman v. Morrison,
477 U.S. 365 (1986) 20, 21

Massaro v. United States,
516 U.S. 933 (1995) 11

McMann v. Richardson,
397 U.S. 759 (1970) 20, 21

Riascos-Prado v. United States,
66 F.3d 30 (2d Cir. 1995) 17

Strickland v. Washington,
466 U.S. 668 (1984) 17, 20, 26

United States v. Cofske,
157 F.3d 1 (1st Cir. 1998),
cert. denied, 526 U.S. 1059 (1999) 21

United States v. Cronic,
466 U.S. 648 (1984) 20, 23

United States v. DeRewal,
10 F.3d 100 (3rd Cir. 1993),
cert. denied, 511 U.S. 1033 (1994) 23, 28

United States v. Evans,
272 F.3d 1069 (8th Cir. 2001),
cert. denied, 122 S. Ct. 1638 (2002) 21

United States v. Frady,
456 U.S. 152 (1982) 29

United States v. Galloway,
56 F.3d 1239 (10th Cir. 1995) 21, 23, 24, 28

United States v. Griffin,
699 F.2d 1102 (11th Cir. 1983) 21, 22

United States v. Jake,
281 F.3d 123 (3rd Cir. 2002) 21

United States v. King,
119 F.3d 290 (4th Cir. 1997) 21

United States v. Neuhausser,
241 F.3d 460 (6th Cir. 2001),
cert. denied, 122 S. Ct. 181 (2001) 21

United States v. Rewald,
889 F.2d 836 (9th Cir. 1989),
cert. denied, 498 U.S. 819 (1990) 21

United States v. Richardson,
167 F.3d 621 (D.C. Cir. 1999),
cert. denied, 528 U.S. 895 (1999) 21

United States v. Rivas,
157 F.3d 364 (5th Cir. 1998) 21

Weisgram v. Marley Co.,
528 U.S. 440 (2000) 31

Constitutional Provisions, Rules and Statutes:

U.S. CONST. amend. V 18

U.S. CONST. amend. VI 1

Supreme Court Rule 10(a) 30

18 U.S.C. § 1951 11

28 U.S.C. § 1254 1

28 U.S.C. § 2253 22

28 U.S.C. § 2255 ..... *passim*

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (Pet. App. 3-10) and the opinion of the District Court for the Southern District of New York (Cedarbaum, J.) (Pet. App. 16-26) are unreported.

JURISDICTION

The unpublished summary order of the Second Circuit was issued on November 2, 2001, and a timely petition for rehearing was denied on January 14, 2002 (Pet. App. 1). The petition for a writ of certiorari was filed on April 15, 2002, and was granted on October 1, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

28 U.S.C. § 2255, a habeas corpus statute, provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution . . . or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> * * *
>
> An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

STATEMENT OF FACTS

The facts relevant to this appeal are, for the most part, undisputed and therefore can be introduced in summary fashion. In 1992, Joseph Massaro, the Petitioner, was charged in 10 counts of an 18-count indictment with racketeering and related RICO offenses. *United States v. Joseph Massaro*, No. 92 Cr. 529 (S.D.N.Y.)(MGC). At the core of the indictment was a charge of murder in aid of a racketeering enterprise. On October 27, 1993, a federal jury convicted Petitioner of the murder and all but one of the racketeering acts.

On July 26, 1994, Petitioner was sentenced to life imprisonment on the murder conviction and is presently serving his sentence at the federal penitentiary at Leavenworth, Kansas. This brief deals solely with Petitioner's conviction of a homicide that he has steadfastly denied committing.

A. The Fiorito Homicide

In the early morning hours of September 21, 1990, the body of Joseph Fiorito, an alleged Lucchese Family associate, was found shot to death in the backseat of his car near the Long Island Expressway in Queens, New York (Tr. 448-49).[1] That same day, one Patrick Esposito, while removing his blood-soaked clothing, confided to his girlfriend that he was involved in the murder of Joseph Fiorito (Tr. 435).

Esposito was arrested and charged in New York State Supreme Court with the murder (Tr. 444-45). In April of 1991, Esposito eventually plea-bargained his way out of the murder charge (J.A. 33). He agreed to testify that Petitioner, Joseph Massaro, fatally shot Joseph Fiorito. As a result of Esposito's cooperation agreement, the state charges against him for second-degree murder were dismissed (Tr. 451-52).

At Joseph Massaro's trial in federal court, Esposito claimed that he helped set the stage for the homicide in a vacant house on Butterfly Drive in Hauppauge, Long Island (Tr. 392-93). There, he alleged, Joseph Massaro was waiting in the basement and shot Fiorito in the head (Tr. 713). Afterwards, Esposito helped haul Fiorito from the house to Fiorito's car (Tr. 416-26), where his body was arranged in a sitting position in the backseat (Tr.

---

[1] In this brief, the following abbreviations are used to indicate the source of quoted or referenced material: "J.A." refers to the Joint Appendix in this Court; "Pet. App." refers to the Appendix to the Petition for Certiorari; "Tr." refers to the trial transcript in the Southern District of New York in *United States v. Massaro*, No. 92 Cr. 529 (S.D.N.Y.) (MGC); "A.C.A." refers to the Appendix in the United States Court of Appeals for the Second Circuit for this § 2255 proceeding. *United States v. Massaro*, Docket No. 00-2720. "Gov't C.A. Br." refers to the Government's Brief in the Second Circuit in that proceeding.

718-19). Esposito also claimed that as they drove away, Petitioner expressed concern that Fiorito was not dead and shot him in the head a second time (Tr. 721-22).[2]

The car, with Fiorito's dead body, was abandoned on a street in Queens where a second man, Joseph Kern, picked up Esposito and Petitioner in another car (Tr. 433). Kern and another man, John Tripi, went to the house on Butterfly Drive afterwards and recovered the shell casing from the bullet fired in the basement (Tr. 443-44).

The police discovered Fiorito's body in the morning and, while removing the body, found a spent shell casing on the floor of the car (Tr. 903-04). However, after pulling up the floor mats and examining the scene for ballistics evidence, the police never found any bullet (Tr. 910-11, 939, 4466-67; J.A. 37).

Esposito had returned home on the night of the shooting and confessed to his girlfriend that "they just did Joey Fiorito" (Tr. 435). He did not name Joseph Massaro as one of the participants in the homicide (Tr. 435-36). Esposito's girlfriend ultimately notified the police about his involvement in the Fiorito homicide. Esposito's clothing, recovered from a dumpster, was heavily stained with Fiorito's blood (Tr. 435, 437).

Joseph Massaro was not arrested until June 24, 1992, almost two years after the homicide and after Esposito began cooperating with the authorities. No bloody clothing was ever recovered from Petitioner, and no guns or bullets were traced to him. The Fiorito murder weapon was never found (Gov't C.A. Br. 15 n.).

[2] This alleged second shot became *the* major point of contention during Petitioner's trial.

By this time, the police and FBI had again searched the car but found no bullets or bullet holes (Tr. 4160-79; J.A. 39). Ultimately, the car was released from the police impound and sold (J.A. 40). A "second or third owner" eventually purchased the car from a gas station in December of 1992 (Tr. 3654; J.A. 40).

In August of 1993, a month before Joseph Massaro's murder trial, the police tracked down the car (Tr. 4185). Then, on September 2, 1993, police officers thoroughly searched the car (Tr. 4184-92). They physically removed the backseat and pulled up the carpet and insulation (Tr. 4187-89). Once again, no bullet or bullet hole was found (Tr. 4191-92).

B. The Trial and the Prosecution's Belated Disclosure of the Bullet

There was absolutely no tangible or forensic evidence that, in any way, connected Petitioner to the murder. The word of Esposito was all that linked Joseph Massaro to the Fiorito homicide (Tr. 388-446). However, on September 6, 1993, the day before the trial was scheduled to start and just four days after trained police officers had again searched the car, the most recent owner of Fiorito's car claimed that he had found a bullet and bullet hole in the carpeting behind the driver's seat near the transmission hump (Tr. 3661-64). The Assistant United States Attorney in charge of the prosecution elected not to advise the court or defense counsel of this discovery (J.A. 53-55).[3]

[3] The prosecutor later admitted that he should have "turned that bullet over the moment it was discovered" (J.A. 129).

The next day, September 7, 1993, counsel for Joseph Massaro, in his opening statement to the jury, declared that "[t]here is not one scientific shred of evidence to indicate that Joseph Massaro was in that car, was in that place or had anything to do with [the murder of Joseph Fiorito], except [the word of] Patty [Esposito], who is buying his freedom" (Tr. 42).

The Government stood silent during all of this and said nothing to either defense counsel or the court about finding a bullet (Tr. 42). After the opening statements the Government called several witnesses, including its key witness, Patrick Esposito, who testified for two days (September 8 and 9, 1993). Still, the Government revealed nothing about the newly discovered bullet (Tr. 90-474; J.A. 49).

On Saturday, September 11, 1993, the prosecutor faxed a letter to defense counsel advising him of the bullet and that a videotape had been made showing where in the car the bullet had been recovered (J.A. 53-55, 176). However, when the trial resumed on September 13, defense counsel failed to raise with the District Judge the issue of the last-minute discovery of the bullet and did not request a copy of the videotape (J.A. 56-57, 65-66).

Not until September 23, 1993, almost two weeks after having been notified of the bullet, did defense counsel voice his concern over the Government's failure to reveal the results of its ballistics analysis (Tr. 1936-37).

C. The Trial Judge Repeatedly Encouraged Defense Counsel to Adjourn the Proceedings to Investigate the Bullet Evidence

On September 27, 1993, 21 days after its discovery, the prosecutor claimed that the spent bullet matched the shell fragments recovered from Fiorito's head (Tr. 1944).[4] The next day, on September 28, defense counsel "reluctantly" moved for a mistrial — which was denied by the trial court (J.A. 15, 19-20, 24, 30).[5]

Nonetheless, the District Judge offered to adjourn the case so that counsel could examine the bullet and investigate the peculiar circumstances of its discovery (J.A. 20, 24). However, counsel refused the offer (J.A. 20).[6] At this time, defense counsel still had not viewed the videotape showing where the bullet had been recovered and had not inspected the car in which the bullet was allegedly found (J.A. 43-44, 60).[7] Counsel also failed to investigate the bullet's last-minute discovery on the eve of trial (J.A. 24-25).

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[4] The remains of the first bullet were apparently recovered in Joseph Fiorito's head as copper jacket fragments and lead core fragments, rather than an intact bullet (J.A. 148, 153).

[5] Counsel advised the court that "this is going to be a financial disaster for me if I have to try this case again" (J.A. 25). He further indicated that "[i]t will break me to do this. It is going to virtually bankrupt me if I have to try this case again" (J.A. 19).

[6] Counsel rejected a continuance but requested, at the very least, that the court preclude the bullet evidence (J.A. 25). That request was also denied (J.A. 109).

[7] On October 1, 1993, the Government gave a copy of the videotape to defense counsel, who had failed to request it (J.A. 65). Counsel indicated that he failed to view the Government's videotape because "I am in the middle of keeping five balls up in the air, Your Honor. I am coming in here at 8:30 in the morning. Maybe I missed it" (J.A. 66).

Judge Cedarbaum encouraged defense counsel on at least three occasions to accept a continuance of the proceedings so that he could conduct a proper investigation of this new and apparently inculpatory evidence (J.A. 20, 24, 56).[8] She also offered defense counsel an opportunity to recall Government witnesses so that he might adjust his defense strategy in light of these startling new developments (J.A. 107-08).

Despite these overtures, counsel declined to examine the circumstances that produced this bullet, found three years after the murder by the new owner of the car following several thorough police searches (Tr. 1926; J.A. 60-61).[9] Instead, counsel went forward with the trial, accepting the Government's representations that the bullet was connected to the murder (J.A. 24-25). He also agreed with the opinion of the Government's ballistics expert that the bullet matched fragments of the bullet taken from Fiorito's head (J.A. 25).[10]

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[8] The prosecutor conceded, "if there is a bullet in there it is very important to our case" (J.A. 41).

[9] Counsel admitted during discussions relating to the continuance, "I may have made a mistake. I made a mistake. Is Mr. Massaro to pay for my mistake when the government comes in and says they found a bullet?" (Tr. 2908). He also acknowledged that he could have asked for a continuance when he was cross-examining the medical examiner (Tr. 2915).

[10] It took the Government's experts two weeks to match the bullet to the fragments (J.A. 67). The NYPD ballistics laboratory could not match the bullet to the shell casing found in the car, and the prosecutor revealed that "the first indication was there was nothing I could do with it because there was no match" (J.A. 42, 50). In contrast, although defense counsel did undertake some independent investigation of the bullet, he indicated that "it took our expert all of about 15 seconds to do this on a microscopic examination" (J.A. 57).

The Government then exploited the newly found bullet, which was admitted into evidence, by arguing in summation:

> Now, the physical evidence is the stuff that cannot be accused of a failing memory, doesn't fade with time. It is not subject to claims of bias or allegations of slant, and it doesn't even have a cooperation agreement with the government. That is the stuff like the bullet fragments which were recovered from the head of Joe Fiorito, and like the bullet which was recovered from the back of the car, the second shot that Joseph Massaro fires from the same gun into Joe Fiorito's head for good measure (Tr. 5059).

The prosecutor also argued that the Government's expert said the bullet found in the car came from the same gun as the bullet fragments that were recovered from Fiorito's head and "the bullet matched from the same gun, from the gun that Joe Massaro used" (Tr. 5205).

Thus, the bullet became the single most important piece of evidence in Petitioner's trial. It severely undermined the defense efforts to discredit Esposito's testimony by showing that no shot was fired in the car (J.A. 21).

(continued from previous page)

Counsel did recall one crime scene investigator (Tr. 4461-80). That police witness testified that he spent an hour at the scene and examined the car with a flashlight. He even picked up the floor mats in the back to search for ballistics evidence, but did not find any bullets or bullet holes during his investigation (Tr. 4466-68).

Joseph Massaro was convicted and received *life sentences* on the three counts of the indictment that related to the Fiorito murder.[11] He has already been incarcerated for more than 10 years.[12]

D. The Direct Appeal

On his direct appeal, new counsel raised a number of issues including the claim that the District Court erred in admitting the bullet into evidence. He also argued the issue of the Government's delay in disclosing the bullet until well into the trial.

During the oral argument in the Second Circuit, Judges Altimari, Jacobs and Calabresi expressed outrage that such a critical piece of evidence was withheld from Petitioner's counsel under these circumstances (J.A. 118-42).[13] Judge Guido Calabresi even declared that the prosecutors were holding back the bullet "in their vest pocket" (J.A. 118).

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[11] Joseph Massaro was sentenced to a concurrent term of 5 years of imprisonment on Count Ten, for travel from New York to New Jersey in aid of extortionate racketeering charged in certain counts of the indictment. He was also sentenced to concurrent terms of imprisonment of 20 years on six other counts of economic extortion (A.C.A. 14).

[12] He has been in the Government's custody since his arraignment on July 2, 1992 (A.C.A. 3).

[13] One of the judges chastised the prosecutor who tried the *Massaro* case: "You don't consider the possibility that counsel who has in a major case planned a whole strategy and is — has begun their strategy is suddenly confronted with the possibility of new evidence of this sort and instead of making a cool and collected tactical judgment, simply *makes a mistake* at that point not to ask for a continuance because after all it's in the middle of a trial and there's a certain [amount] of pressure both ways and then as a result of that *what you now concede is the most important evidence in the trial comes in.* And that this was a tactic that it was just somebody that got put in a tough situation because of your mistake" (J.A. 137) (emphasis supplied).

Nonetheless, the Second Circuit affirmed the conviction and found that such Government conduct "did not irreparably damage Massaro's strategy . . . Massaro has not claimed that he would have changed his cross-examination [of Esposito] had he been aware of the bullet" (Pet. App. 36).[14]

On October 16, 1995, this Court denied certiorari on Petitioner's direct appeal from his conviction. *Massaro v. United States*, No. 95-461, 516 U.S. 933 (1995). The issue of ineffectiveness of counsel in failing to investigate the sudden appearance of the bullet was not presented to this Court in that petition.[15]

E. Trial Counsel's Ineffectiveness Is Raised in a Motion Pursuant to 28 U.S.C. § 2255

In anticipation of a possible motion pursuant to Rule 33 of the Federal Rules of Criminal Procedure,[16] new counsel, Michael Tigar, was engaged to investigate the evidence and proceedings leading to Joseph Massaro's conviction (J.A. 180). The forensic investigation revealed that the shooting in the car *could not have occurred* in the manner

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[14] The Second Circuit's decision did, however, declare that "the government should have advised the defense immediately of the bullet's discovery" (Pet. App. 36).

[15] The two issues presented were (1) whether there was sufficient effect on interstate commerce to warrant this criminal prosecution under the Hobbs Act, 18 U.S.C. § 1951, and (2) whether the Government's failure to disclose the discovery of a crucial piece of evidence, to wit, a matching bullet, until after opening statements and cross-examination of a witness violated the Defendant's rights under the Due Process Clause.

[16] Fed. R. Crim. P. 33 provides that a defendant may make a motion for a new trial based on newly discovered evidence.

described by Esposito and that it was *highly unlikely* that the bullet was connected with the Fiorito homicide (J.A. 151, 161-62).

For example, Robert Kopec, a well-recognized forensic expert who reviewed "numerous police reports, laboratory reports, autopsy reports, statements, photographs, diagrams and transcripts of the trial testimony" in Joseph Massaro's case, concluded that "it is unlikely that the shooting occurred in the vehicle" (J.A. 145). The expert based this determination in part on the fact that the "copper-jacketed hollow point bullet" was found in "only a moderately deformed condition" even though such a bullet that allegedly passed through "both sides of the victim's skull, his brain, and striking the carpeted metal floor of the vehicle" would have been "expected to be found in an extremely deformed condition" (J.A. 148-49). Color photographs, which are reproduced at J.A. 153-54, support the expert's opinion.

In addition, Charles Morton, a leading criminologist, inspected the physical evidence on October 23 and 24, 1996. Although the Government permitted only a restricted examination, his investigation revealed "serious questions about the validity of this evidence" (J.A. 174). Mr. Morton's affidavit (J.A. 164-75) was significant, not just in discrediting the prosecution, but also in pointing out defense counsel's failures at trial. Mr. Morton observed that "[n]o attempt was made to adequately document the condition of the hole in the carpet or to test it to determine if, in fact, it was a bullet hole consistent with the .380 auto cartridge case and bullet found in this case" (J.A. 174). This is crucial in light of concessions that counsel never examined the car in which the bullet was found (Gov't C.A. Br. 29). Furthermore, Mr. Morton alerted new counsel that "[n]o attempt was made to test

blood or tissue residues on the bullet, as shown in photographs, to determine if it was consistent with being from the victim" (J.A. 174-75).

It was only then that the full impact of and prejudice from trial counsel's failure to seek a continuance became evident. But Petitioner's direct appeal had been exhausted before these crucial findings were made. Thus, Joseph Massaro was forced to bring his ineffectiveness claim in the instant proceeding pursuant to 28 U.S.C. § 2255 (A.C.A. 18).

F. The District Court and Second Circuit Find That the Ineffectiveness Claim Is Procedurally Barred Because It Was Not Raised on Direct Appeal

The District Judge held that Petitioner was "procedurally barred" from raising the ineffectiveness claim in a § 2255 proceeding because he "was represented by new counsel on appeal and each of the grounds he asserts to support this claim was apparent from the trial record" (Pet. App. 24-25). The District Court never addressed the merits of Joseph Massaro's ineffectiveness claim (Pet. App. 26).

On December 26, 2000, the District Court granted a Certificate of Appealability on the issue of

> whether trial counsel's decision not to accept a continuance after receiving important new information from the government, which Massaro now characterizes as a deprivation of his right to effective assistance of counsel, is procedurally barred by the failure of new appellate counsel, who raised the issue of the government's belated disclosure, to also argue that issue under the rubric of ineffective assistance of counsel (Pet. App. 27).

In addition, the Second Circuit concluded that Petitioner was procedurally barred from obtaining any review of his ineffectiveness claim because he was "represented by different counsel during direct appeal of his conviction" and "the basis for Massaro's claim of ineffective assistance of counsel for failure to accept a continuance is based solely on the record adduced at trial and available to Massaro's appellate counsel on direct appeal" (Pet. App. 7).[17] The court further held that Petitioner did not establish cause for the failure to raise the ineffectiveness issue on direct appeal because there was no showing that the factual basis for the claim was not reasonably available, despite the exercise of reasonable diligence (Pet. App. 8). The Second Circuit never touched upon the merits of Petitioner's ineffectiveness claim.

On January 14, 2002, the Court of Appeals for the Second Circuit denied Joseph Massaro's petition for rehearing and suggestion of rehearing *en banc* (Pet. App. 1). On October 1, 2002, this Court granted a petition for certiorari.

[17] The court reasoned that "[a]t trial, Massaro's counsel engaged in many discussions about the decision not to accept a continuance" (Pet. App. 7).

SUMMARY OF ARGUMENT

Virtually all the Courts of Appeals hold that defendants who have been deprived of their constitutionally guaranteed right to the effective assistance of counsel can assert that complaint in a collateral proceeding, authorized by 28 U.S.C. § 2255, even if they failed to raise the issue on direct appeal. The Solicitor General has historically supported this view.

However, the Court of Appeals for the Second Circuit has barred Petitioner from bringing his ineffectiveness claim in a collateral proceeding because the court concluded that the issue was based solely on the trial record and new appellate counsel failed to raise the claim on direct appeal. The court, citing to *Billy-Eko v. United States*, 8 F.3d 111 (2d Cir. 1993), also found that Petitioner did not show sufficient "cause" why the issue was not raised on direct appeal.

This Court should, under its supervisory powers, adopt a uniform policy that permits a § 2255 petitioner to raise a Sixth Amendment ineffectiveness challenge even though that issue was not raised on direct appeal.[18] The Solicitor General has recognized that a defendant should be allowed "to raise a claim of ineffective assistance of counsel on collateral review without being required to show why the claim could not have been raised on direct appeal" because it "avoids time-consuming litigation over issues of cause and prejudice" (Solicitor General Br. in Opp'n to Cert. at 12). This procedure also "ensures that the district court

[18] This Court "has supervisory authority over the federal courts" and "may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals." *Dickerson v. United States*, 530 U.S. 428, 437 (2000).

has an opportunity to pass on all ineffectiveness claims under 28 U.S.C. § 2255 before their presentation to an appellate court." *Id.*

Moreover, the rationale for differentiating an ineffectiveness claim from normal appellate rules of procedural forfeiture derives from a recognition that such claims customarily depend on facts that are outside the trial record. Thus, a § 2255 proceeding is better suited than an appellate court to accumulate the facts relevant to such a challenge. And, it permits a District Judge to pass on *all* the defendant's ineffectiveness claims, at one time, *before* appellate review is undertaken.

This procedure is consistent with conventional notions of appellate review, where only those matters previously decided by a District Judge, and accompanied by factual findings, are subject to review. Thus, the collateral review rule is more efficient than the rule of the Second Circuit. Also, the collateral review procedure provides a bright-line rule that has the advantage of certitude and is much more easily administered.

In contrast, the Second Circuit's rule fails to provide any clear-cut standards by which a defendant can gauge whether a potential ineffectiveness claim should be raised on direct appeal. Terms such as "solely on the record developed at trial," the "*cause*" factor justifying a failure to raise the issue on direct appeal, and the consequential "actual *prejudice*" resulting from such a default are fraught with ambiguity and uncertainty. These vague variables that must be applied to ineffectiveness claims in the Second Circuit have been an endless source of controversy and

litigation.[19] For instance, questions concerning whether counsel's ineffectiveness is fully and adequately developed on the trial record can be immensely complicated and confusing. And, even if the facts giving rise to counsel's ineffectiveness are spelled out on the record, the *prejudice* to the defendant required under *Strickland v. Washington*, 466 U.S. 668 (1984), may not be apparent.

But, perhaps the most serious flaw in the Second Circuit's reasoning is its admonishment that lawyers should strive to raise all ineffectiveness claims on direct appeal even if further factual development may be required. This is extremely troublesome and presents some serious hazards. In essence, an appellate lawyer is required to search the record for all ineffective assistance claims to avoid possible waiver of those issues. In turn, the appellate court is obligated to sort through the choate and inchoate ineffectiveness claims, which is a timely and cumbersome task.

Thus, a rule that allows for collateral review is clearly the most orderly and efficient method of resolving the ever-growing number of ineffective assistance claims. That is why it has attracted such overwhelming support from most of the Circuit Courts and was promoted by the Solicitor

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[19] The law on this issue in the Second Circuit is actually terribly confusing to appellate attorneys. For example, in *Riascos-Prado v. United States*, 66 F.3d 30 (2d Cir. 1995), the Second Circuit was forced to address the applicability of the *Billy-Eko* doctrine where various claims of trial counsel's ineffectiveness arose — some of which were fully developed on the record while other claims were not. The court concluded that new appellate counsel would be required to raise, on direct appeal, "those claims of ineffectiveness that needed no elaboration of the trial record" while reserving the other ineffectiveness claims for resolution in a collateral proceeding after further factual development. 66 F.3d at 35.

General. In contrast, judged from the infallible distance of time, the Second Circuit's procedure has proven to be inefficient and inequitable. It should be replaced by the prevailing practice of allowing all ineffectiveness claims to be brought in a § 2255 proceeding.

In this case, Petitioner's counsel, when surprised with a bullet during his murder trial, declined to accept the court's offers of an adjournment to enable him to investigate the bullet's connection to the homicide, as well as the peculiar circumstances of its last-minute discovery. This dereliction was particularly devastating when the bullet became the single most damaging piece of evidence leading to Petitioner's conviction. A subsequent investigation produced evidence indicating that it was "highly unlikely" that the bullet was connected to the shooting.

The critical failure to take time to properly investigate the bullet infiltrated every tissue of the case because of the central role the bullet played at trial. This piece of evidence became the lynchpin of the whole prosecution. And, sadly, it gave the Government's case a false authenticity that simply could not be overcome by defense counsel without the knowledge of the *true* evidence that now drastically undermines any connection of the bullet to the murder. The failure to seek a continuance was decisive because it would have enabled counsel to demonstrate facts, available at the time, which would have put the lie to the so-called "telltale" bullet.

Prisoners such as Joseph Massaro, who have been convicted because of constitutional errors, suffer a grievous wrong. The Second Circuit's decision denying him a hearing on his ineffectiveness claim has deprived Petitioner of his Fifth Amendment right to due process and equal

protection of the law. He should, at the very least, be entitled to a hearing into the substance of his complaint without being required to show why the claim could not have been raised on direct appeal.

The procedural bar fashioned by the Second Circuit, which has been rejected by most of the Courts of Appeals, unjustly deprives defendants of judicial review of their Sixth Amendment claims, erodes confidence in the criminal justice system and degrades the constitutional right to the effective assistance of counsel.

ARGUMENT

The right to the assistance of counsel, guaranteed by the Sixth Amendment to the United States Constitution, forms the very heart and soul of our federal criminal justice system because it protects "the fundamental right to a fair trial." *Strickland v. Washington*, 466 U.S. 668, 684 (1984), *citing Powell v. Alabama*, 287 U.S. 45 (1932); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Gideon v. Wainwright*, 372 U.S. 335 (1963). However, the representation must be *effective* to fulfill the constitutional necessities of the Sixth Amendment. *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970); *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986). Effective lawyers are "essential because they are the means through which the other rights of the person on trial are secured." *United States v. Cronic*, 466 U.S. 648, 653 (1984). The defense of criminal cases, where a person's life and liberty are at stake, requires an all-consuming commitment to the client.

Joseph Massaro was denied this quality of commitment when his trial attorney failed to investigate the singular piece of evidence that condemned him to a sentence of life imprisonment. And now he has been precluded from asserting that complaint, grounded in the Sixth Amendment, because of an unusual rule of procedural forfeiture devised by the Court of Appeals for the Second Circuit.

The profound equal protection and due process implications of this important issue are underscored by the realization that similarly situated defendants in other parts of the country are permitted to assert such a claim in a collateral proceeding.

I. Federal Criminal Defendants Should Not Be Procedurally Barred from Challenging Trial Counsel's Effectiveness in a Collateral Proceeding

This Court has held that "[b]ecause collateral review will frequently be the only means through which an accused can effectuate the right to counsel, restricting the litigation of some Sixth Amendment claims to trial and direct review would seriously interfere with an accused's right to effective representation." *Kimmelman*, 477 U.S. at 378.

Nearly every Circuit Court has adopted the rule that ineffectiveness claims should be brought in a collateral proceeding pursuant to 28 U.S.C. § 2255, rather than on direct appeal.[20] The formidable reasons in favor of presenting ineffectiveness claims in collateral proceedings rather than on direct appeal were cataloged by the Eleventh Circuit in *United States v. Griffin*, 699 F.2d 1102 (11th Cir. 1983).

First, in a § 2255 proceeding the defendant is afforded a full opportunity to produce facts that establish ineffectiveness of counsel and the Government has the

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[20] *See, e.g.*, *United States v. Cofske*, 157 F.3d 1, 2 (1st Cir. 1998), *cert. denied*, 526 U.S. 1059 (1999); *United States v. Jake*, 281 F.3d 123, 132 n.7 (3rd Cir. 2002); *United States v. King*, 119 F.3d 290, 295 (4th Cir. 1997); *United States v. Rivas*, 157 F.3d 364, 369 (5th Cir. 1998); *United States v. Neuhausser*, 241 F.3d 460, 474 (6th Cir. 2001), *cert. denied*, No. 00-10790, 122 S. Ct. 181 (2001); *United States v. Evans*, 272 F.3d 1069, 1093 (8th Cir. 2001), *cert. denied*, No. 01-9266, 122 S. Ct. 1638 (2002); *United States v. Rewald*, 889 F.2d 836, 859 (9th Cir. 1989), *cert. denied*, 498 U.S. 819 (1990); *United States v. Galloway*, 56 F.3d 1239, 1240 (10th Cir. 1995) (*en banc*); *United States v. Griffin*, 699 F.2d 1102, 1107-09 (11th Cir. 1983); *United States v. Richardson*, 167 F.3d 621, 626 (D.C. Cir. 1999), *cert. denied*, 528 U.S. 895 (1999).

chance to present evidence as well. The District Court hears the actual testimony and makes judgments concerning credibility. The end result is a full factual record that bears precisely on the issue. *Griffin*, 699 F.2d at 1109.[21]

Second, an "election to decide whether the record on appeal is adequate for decision on the issue not only adds to the burgeoning workload of appellate judges in a particular case, but makes a mockery of the repeated statement that the issue [of ineffectiveness] may not be presented for the first time on appeal." *Griffin*, 699 F.2d at 1109. Defendants will feel compelled to raise ineffectiveness claims that are, at best, questionable or unripe, and counsel for the Government and the Court of Appeals will be obligated to scour the record to determine whether or not the matter was, in fact, fully developed.

Finally, where "a perfectly adequate, indeed superior, judicial procedure agreeable to the Constitution has been established for presentation and determination of an issue [28 U.S.C. § 2255]," the courts' "duty to all of the interests involved lies not in devising or permitting a fugitive procedure of [its] own design but in requiring adherence to the procedure established." *Griffin*, 699 F.2d at 1109.

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[21] Although not addressed by *Griffin*, since the enactment of the Antiterrorism and Effective Death Penalty Act in 1996, all appeals in proceedings brought under 28 U.S.C. § 2255 require a "Certificate of Appealability" from the District Judge or Court of Appeals. 28 U.S.C. § 2253(c)(1). A "Certificate of Appealability" may not be issued unless "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Under this system, many ineffectiveness claims are resolved in the District Court without any need for appellate review.

In *United States v. Cronic*, 466 U.S. at 667 n.42, the Solicitor General embraced the approach that "a defendant can attack the actual performance of trial counsel only through a petition for post-conviction relief under 28 U.S.C. § 2255, and not through direct appeal." The Government's principal reason for advocating this rule is that such claims inevitably require consideration of facts that "are outside the record on direct appeal and that should be considered by the district court in the first instance."[22]

The prevailing rule, which, as discussed below, is deeply rooted in the doctrines of judicial economy and due process, provides that even if the claim could fairly be resolved on direct appeal, *no procedural bar* will apply to ineffectiveness claims that were first brought in post-conviction proceedings instead. *See, e.g., United States v. Galloway*, 56 F.3d 1239, 1242 (10th Cir. 1995) (*en banc*) (claims that are fully developed in the record *may* be brought on direct appeal *or* under § 2255); *United States v. DeRewal*, 10 F.3d 100, 101 (3rd Cir. 1993), *cert. denied*, 511 U.S. 1033 (1994).

In fact, the Solicitor General repeatedly endorsed this approach in briefs filed in this Court. And, based on that formidable stance, this Court granted certiorari to vacate judgments where defendants were erroneously barred from presenting ineffectiveness claims on direct appeal. *See, e.g., Billy-Eko v. United States*, 509 U.S. 901 (1993); *Diaz-Albertini v. United States*, 498 U.S. 1061 (1991); *Chappell v. United States*, 494 U.S. 1075 (1990). In each of those cases, this Court remanded the claims to the Circuit "for further consideration in light of the position asserted by the Solicitor in his brief for the United States."

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[22] Solicitor General Br. in Supp. of Cert. at 6, *Billy-Eko v. United States*, 509 U.S. 901 (1993) (No. 92-7897).

II. The Second Circuit's Procedure

Following this Court's remand of *Diaz-Albertini* to the Tenth Circuit, the full complement of that Court of Appeals eventually adopted the Solicitor General's approach. *See United States v. Galloway*, 56 F.3d 1239 (10th Cir. 1995) (*en banc*). However, after this Court's remand of *Billy-Eko*, the Second Circuit persisted in adhering to its original position that a defendant is barred from bringing an ineffectiveness claim in a § 2255 proceeding where the issue appears on the record and where new appellate counsel fails to raise that issue on direct appeal. *Billy-Eko v. United States*, 8 F.3d 111 (2d Cir. 1993).[23] Under the Second Circuit's approach, the only way a defendant can gain relief from this strict rule of preclusion is to establish just cause for his lawyer's default *and* demonstrate "actual prejudice" resulting from that omission. *Billy-Eko*, 8 F.3d at 115. This is too high a barrier to overcome.[24]

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[23] In *Guinan v. United States*, 6 F.3d 468 (7th Cir. 1993), the Seventh Circuit seemed to adopt a procedure similar to that of the Second Circuit — finding a waiver of any ineffectiveness claim that could have been asserted by new counsel on direct appeal. However, in an incisive and thoughtful concurrence, Circuit Judge Frank H. Easterbrook denounced the majority's decision that directed district judges "to enforce a forfeiture rule that neither prosecutors nor prisoners want." 6 F.3d at 475-76 (Easterbrook, J., concurring).

[24] Petitioner is only one in a long line of criminal defendants who have become casualties of *Billy-Eko*. Time and time again judges in the Second Circuit have invoked its rule to bar federal defendants from ever obtaining any judicial review of their trial counsel's failings. *See, e.g., Douglas v. United States*, 13 F.3d 43 (2d Cir. 1993); *Hernandez v. United States*, No. 97 Civ. 5620 (TPG), 2002 WL 2012624 (S.D.N.Y. Aug. 30, 2002); *Mendez v. United States*, No. 99 Civ. 3496 (JFK), 2002 WL 1402321 (S.D.N.Y. June 28, 2002); *James v. United States*, No. 00 Civ. 8818 (GWG), 2002 WL 1023146 (S.D.N.Y. May 20, 2002). This list is illustrative only and is by no means exhaustive.

The *Billy-Eko* rule of preclusion is flawed in its most fundamental aspects. Questions abound concerning whether counsel's ineffectiveness is fully and adequately developed on the trial record. For example: (1) Was a full evidentiary hearing conducted as to the specific issue or, as in Petitioner's case, was it merely mentioned during the course of the trial? (2) Must a full adversarial hearing be conducted on a failing that may have its roots in the trial record — such as counsel's failure to object to the admission of certain evidence? (3) Must the defendant be represented by separate counsel during any proceeding in which a challenge to the effectiveness of his attorney has been presented? (4) Should defense attorneys be given an opportunity to explain their actions?[25]

Additionally, under *Billy-Eko* the appellate court is frequently obliged to confront claims based on incomplete records that need to be reinforced with facts from the attorney accused of the deficient performance. Thus, the Court of Appeals is often compelled to remand the case for a full hearing in the District Court or direct that the ineffectiveness claim be reinstated in a § 2255 proceeding.[26] And, even if the facts giving rise to counsel's ineffectiveness are fully spelled out on the trial record,

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[25] As recognized by the Tenth Circuit, "at the very least counsel accused of deficient performance can explain their reasoning and actions, and the district court can render its opinion on the *merits* of the claim." *Galloway*, 56 F.3d at 1240 (emphasis supplied).

[26] "[F]orcing criminal defendants to raise ineffective assistance claims on direct appeal is an impractical approach which fails miserably at furthering the goal of finality of judgments" because, in part, the procedural bar doctrine is "painfully labor intensive to sort through and apply." *English v. Cody*, 146 F.3d 1257, 1262 (1998).

the *prejudice* to the defendant through counsel's deficient performance, required under *Strickland v. Washington*, 466 U.S. 668 (1984), may not be apparent on direct appeal.[27]

In addition, under the Second Circuit's approach, appellate counsel, who is bound by the trial record, must now undertake investigations to find prejudice. This requires exploration outside the boundaries of the trial. Such a requirement places unreasonable and unbearable burdens upon appellate counsel, who may himself face exposure to a separate ineffectiveness claim if he does not conduct such an investigation.

Another unsettling aspect of the Second Circuit's rule is its stern warning that appellate lawyers would be "well-advised to err on the side of inclusion [of an ineffectiveness claim] on direct appeal" even if further factual development is required. *Billy-Eko*, 8 F.3d at 116. The panel explains that this will give the Court of Appeals an opportunity to either remand the case to the District Court or leave the defendant to his post-conviction remedies. *Id.* However, this cumbersome parsing and paring of ineffectiveness claims is completely avoided by the rule that allows for collateral review, rather than a procedural bar. Significantly, one of the main virtues of the collateral review rule is that all ineffectiveness claims can be brought in a single proceeding in the District Court, which has the facilities for developing a full record.

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[27] In *Strickland*, this Court established a two-prong test with which to evaluate ineffective assistance claims: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." 466 U.S. at 687.

But, more important, appellate counsel's obligation to present any possible ineffectiveness claim on direct appeal is fraught with hazards for the defendant. If counsel raises an unripe or sheer ineffectiveness claim merely to avoid the risk of waiver, the Court of Appeals may actually reject the claim on the merits, finding that the incomplete record was sufficient for adjudication. That defendant would then be barred from raising the same issue in a collateral proceeding because the court reached the merits of the ineffectiveness claim, even though further factual development — outside of what appeared on the record — may have established that counsel was truly ineffective.

Therefore, in the long run, defendants may be prejudiced by appellate attorneys who raise premature ineffectiveness claims that would have been stronger if reinforced with additional facts available in a § 2255 proceeding. As Judge Easterbrook of the Seventh Circuit so incisively observed, lawyers "who raise ineffective-assistance claims on direct appeal do their clients a grave disservice, because the inevitable loss will prevent the accused from raising the same claim later, when factual development would permit accurate resolution." *Guinan v. United States*, 6 F.3d 468, 476 (7th Cir. 1993) (Easterbrook, J., concurring).

The collateral review rule, used by most of the Circuit Courts and advocated by the Solicitor General, allows appellate counsel to attend to the more urgent appellate objectives and leave any potential ineffectiveness claims for a § 2255 proceeding. This way counsel can concentrate on the true appellate issues that stem from the trial record rather than search for ineffectiveness claims that are only partially visible in the trial record.

III. The Cause and Actual Prejudice Exception Should Not Be Applied to Ineffective Assistance Claims

Recognizing the severe consequences of waiver, the Second Circuit conceded an "eye of the needle" exception to the *Billy-Eko* doctrine of procedural forfeiture whereby the failure of new appellate counsel to raise a fully developed ineffectiveness claim on direct appeal can be excused only "if the defendant can demonstrate cause for the failure to raise the issue and actual prejudice resulted therefrom" (Pet. App. 7). However, the "cause and actual prejudice" exception is notoriously unwieldy and unworkable, as acknowledged by the Tenth Circuit:

> [I]f procedural bar is raised as a defense, it embroils us in nonmerits issues which are as time consuming as if we went straight to the merits, and infinitely less productive. Applying, as we must, the cause and prejudice standard for avoiding the procedural default, we must first examine all the reasons advanced as cause, and write on the subtext after revisiting everything that happened on direct appeal, and then some. In conjunction, or as an alternative, we must examine prejudice, which is nothing less than evaluating the merits to determine whether we should evaluate the merits. Nothing productive is accomplished. *Galloway*, 56 F.3d at 1242.

The Third Circuit also concluded that the perplexing "cause and actual prejudice" standard does not apply to an ineffective assistance of counsel claim asserted in a § 2255 petition. *United States v. DeRewal*, 10 F.3d at 101 (the requirement would lead to unnecessary confusion and a proliferation of litigation regarding alleged procedural defaults).

We recognize that this Court has adopted the "cause and actual prejudice" standard where a defendant seeks to obtain collateral relief based on trial errors to which no contemporaneous objection was made. *United States v. Frady*, 456 U.S. 152, 167-68 (1982). However, for the sound reasons suggested by the Courts of Appeals for the Third and Tenth Circuits, as well as the Solicitor General, this difficult standard should not be used to bar defendants from raising Sixth Amendment claims.

IV. The Deprivation of a Defendant's Right to Judicial Review of a Constitutional Question Requires Uniform Resolution

A defendant's right to the effective assistance of counsel continues to be an issue of great concern in all federal courts. Thus, it is evident that this Court should give some definitive guidance concerning when these claims may be brought and in what manner. Despite acknowledging a clear conflict among the Circuits as to this issue, the Solicitor General opposed certiorari by this Court on the basis that the "choice of which procedural rule to adopt is not an issue requiring a uniform national solution" (Solicitor General Br. in Opp'n to Cert. at 11-12).

However, the right to obtain judicial review of an ineffectiveness claim, brought under the Sixth Amendment, is a matter that needs a national policy for its resolution.[28] Moreover, the Solicitor General previously acknowledged that "[t]here is, of course, much to be said for a clear and uniform rule in this area, so that appellate counsel, the government, and the courts will not have to speculate about whether an ineffective assistance claim is properly

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[28] Benjamin N. Cardozo, *The Nature of the Judicial Process* 112 (Yale Univ. Press 1921) ("One of the most fundamental social interests is that law shall be uniform and impartial").

presented on direct appeal and will not have to draw uncertain lines in proceedings under 28 U.S.C. 2255 in deciding whether the claim should have been presented on direct appeal" (Solicitor General Br. in Opp'n to Cert., *Diaz-Albertini v. United States*, No. 90-552 (Dec. 1990)).

The Solicitor General continued that the "general rule we proposed in *Cronic* and *Chappell*[29] — that claims of ineffective assistance of trial counsel should be raised for the first time in the District Court in a motion under Section 2255 — serves that purpose." *Id.* The Solicitor General concluded that "although a defendant in petitioner's position might be fully able as a practical matter to raise his ineffective assistance of trial counsel claim on direct appeal, the preferable result from the perspective of the federal criminal justice system as a whole is that he should not be required to do so — and that he therefore need not show cause for failing to do so in order to raise the claim in a motion under Section 2255." *Id.*

The creation of a bar to, or a forfeiture of, the presentation of constitutional claims in § 2255 proceedings constitutes a radical departure from the "accepted and usual course of judicial proceedings" whereby § 2255 motions are *the* proper and conventional way to challenge counsel's ineffectiveness.[30] Thus, this case fully qualifies for the

[29] *Chappell v. United States*, 494 U.S. 1075 (1990).

[30] Supreme Court Rule 10(a) provides that review by this Court may be granted where a "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Rule 10(a) further provides that certiorari may be granted where a court of appeals has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned a departure by a lower court, as to call for an exercise of this Court's supervisory power."

exercise of this Court's supervisory power to impose some consistency and uniformity in this important area of controversy. *Cf. Dickerson v. United States*, 530 U.S. 428, 437 (2000).

The Solicitor General suggests that this Court should refrain from establishing one standardized rule for all federal defendants because the issue is procedural rather than substantive (Solicitor General Br. in Opp'n to Cert. at 12). However, this Court has historically granted review, even in the civil context which involves considerably lesser constitutional interests, to resolve questions relating to the Court of Appeals' jurisdiction.[31]

Moreover, a division among the Circuits invites confusion — especially in the criminal context where the same Sixth Amendment governs all federal defendants throughout the country. This Court should not condone conflicts among neighboring Courts of Appeals on an issue as important as judicial review of the deprivation of a constitutional right.

The continuing rivalry that exists in the Circuits over the effective assistance of counsel is intolerable. In the United States, the right to challenge the constitutionality of a conviction, based upon a Sixth Amendment violation, must be the same for all. Otherwise that right is rendered conditional. And, a conditional right, heavily encumbered by unrealistic preservation requirements, is no right at all.

[31] *See, e.g., Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981) (Supreme Court granted certiorari to resolve a conflict among the Circuits on the question of whether District Court orders denying counsel's disqualification motions are immediately appealable); *Weisgram v. Marley Co.*, 528 U.S. 440 (2000) (certiorari granted to resolve conflict as to whether an appellate court may direct the entry of judgment as a matter of law).

The parochial procedural preferences of the Second and Seventh Circuits must yield to the superior force of a national rule that embraces the prevailing view that *all* ineffective assistance of counsel claims can be brought in a collateral proceeding, even though that issue was not raised on direct appeal. Such a uniform policy will bring badly needed stability and certainty to an area of expanding constitutional litigation.

V. Petitioner's Ineffectiveness Claim Was Not Based Solely on the Record Developed at Trial and the Facts of This Case Lead to the Inevitable Conclusion That Judicial Review is Required of This Claim

Finally, even if this Court sustains the Second Circuit's extreme approach, Petitioner should not be barred from obtaining judicial review of the merits of his Sixth Amendment claim that was *not* based solely on the record developed at trial.

While some of counsel's failings were apparent in the trial record, the panel overlooked the crucial *prejudice* component under *Strickland*. For example, on Joseph Massaro's direct appeal, counsel had no basis to assert prejudice from the trial lawyer's failure to obtain an adjournment because, based on the record, the bullet appeared to be linked to the murder. It was only after the appeal that a proper investigation uncovered the *prejudice* resulting from counsel's refusal of the court's repeated offers of a continuance to investigate the bizarre circumstances surrounding the belated discovery of the bullet.

Moreover, new appellate counsel, who was bound by the trial record, had no duty to conduct an independent investigation of the bullet's origin outside the confines

of the record in the trial court. Only after a subsequent examination uncovered the fallacies in the Government's analysis of the bullet (J.A. 164-75) did the prejudice of counsel's failings become manifest.

Furthermore, even if the ineffectiveness claim could have been raised on direct appeal, Joseph Massaro's complaint is certainly significant enough to meet the Second Circuit's "cause and actual prejudice" test. The Government's withholding of the bullet constituted cause for not bringing the ineffective assistance claim on direct appeal.[32] The failure to disclose such a vital piece of evidence placed counsel in an untenable position and one from which he admittedly should have acted more competently to extricate the Defendant. One cannot deny, however, the Government's contribution to this dilemma and the prejudice to Joseph Massaro.[33]

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[32] The Government infringes on effective assistance of counsel when it interferes with counsel's right to make important decisions concerning the defense of the accused. *Geders v. United States*, 425 U.S. 80, 91 (1986).

[33] At the very least, there should have been an investigation of this constitutional issue through a hearing. *See, e.g., Bloomer v. United States*, 162 F.3d 187, 195 (2d Cir. 1998) (district court order denying petitioner's application for relief under 28 U.S.C. § 2255 was vacated and remanded so that trial counsel could be called and then the court could make a finding as to the ineffective assistance claim).

The unusual facts of this case also lead to the inevitable conclusion that Petitioner should not be deprived of a proper avenue for judicial review of his constitutional claim. To briefly summarize, we urge that review is just and warranted where the undisputed facts establish:

(1) Only after he was able to buy and broker a deal with the Government did Patrick Esposito implicate Joseph Massaro in the murder;

(2) initially there was absolutely no physical evidence to link Massaro to the homicide;

(3) a bullet surfaces *three years* after the murder — even though the car in which it was allegedly found had been thoroughly searched by the police and was out of the control and custody of the State for a considerable period of time;

(4) the prosecutor learned about the bullet *before* defense counsel made his opening statement and held onto it, rather than divulge this important evidence to the defense;

(5) well into the trial the prosecutor eventually notified counsel of the bullet and his test results;

(6) defense counsel failed to take adequate steps to investigate issues relating to the belatedly revealed bullet;

(7) after a considerable amount of time, defense counsel "reluctantly" moved for a mistrial and indicated that a new trial would "virtually bankrupt" him;[34]

(8) the trial court denied the motion for a mistrial but repeatedly offered defense counsel continuances to investigate the scientific evidence — all of which were rejected by counsel;

(9) no hearing was ever conducted on whether trial counsel was ineffective in failing to accept a continuance;

(10) subsequent investigations revealed the full effect of defense counsel's failure to test the bullet and conduct further investigation; and

(11) the Second Circuit's strict imposition of a procedural bar deviates from virtually all other authority throughout the nation as well as the position traditionally advocated by the Solicitor General.

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[34] Here, trial counsel's judgment may have been influenced by concerns for his own financial welfare, creating a "conflict" that would render his representation "presumptively" ineffective. Counsel's complaint that he could not "afford" a mistrial because it would "bankrupt" him is troubling — even though he moved for one (J.A. 19, 25). These personal concerns may have been responsible for his refusal to seek a continuance which would have prolonged the trial and placed an additional drain on counsel's resources. Considering the high mortality rate of mistrial motions, it is fair to assume that counsel anticipated its denial. On the other hand, he knew that the continuance would be granted because of the court's clear offer. A conflict, based on personal financial concerns, places in a different light counsel's other trial defaults.

The indispensable safeguards that our civilization has evolved for the ascertainment of guilt were denied to Joseph Massaro because of counsel's ineffectiveness taken in combination with the prosecutor's action in withholding the bullet until after the trial commenced.

The true injustice in this case — and in those that are bound to emerge in its wake — is that the District Court and Second Circuit never addressed the merits of Joseph Massaro's ineffectiveness claim and instead relied on the precarious claim of "procedural forfeiture" to deny judicial review. Under *Billy-Eko*, defendants like Joseph Massaro will be deprived of *any* safeguards where certain ineffectiveness claims are presented on collateral attack, rather than direct appeal.

CONCLUSION

All that Joseph Massaro has ever asked for is his day in court[35] — a chance to have the merits of his ineffective assistance of counsel claim addressed. The judgment of the Court of Appeals should be reversed and the case should be remanded to the District Court for a hearing on whether Joseph Massaro was deprived of the effective assistance of counsel.

The Court should overrule the doctrine established in *Billy-Eko v. United States*, 8 F.3d 111 (2d Cir. 1993), as applied in this case, and adopt a uniform policy that permits a federal criminal defendant to raise a Sixth Amendment ineffectiveness challenge in a collateral proceeding even though that issue was not raised on direct appeal.

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[35] *Cf. Coleman v. Alabama*, 377 U.S. 129, 133 (1964) (criminal defendant was entitled to have his day in court on his allegations of the systemic exclusion of African American jurors in his case even though he first raised the issue in a motion for a new trial).

November 14, 2002

Respectfully submitted,

HERALD PRICE FAHRINGER*
ERICA T. DUBNO
LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY
& CAMBRIA LLP
780 Third Avenue, 32nd Floor
New York, NY 10017
(212) 319-5351

Counsel for Petitioner

** Counsel of Record*

Of Counsel:
EUGENE GRESSMAN
Univ. of North Carolina
School of Law
Campus Box #3380
Chapel Hill, NC 27599
(919) 962-3688

Supreme Court, U.S.
FILED
DEC 18 2002
OFFICE OF THE CLERK

No. 01-1559

In the Supreme Court of the United States

JOSEPH MASSARO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

THEODORE B. OLSON
Solicitor General
Counsel of Record
MICHAEL CHERTOFF
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
SRI SRINIVASAN
Assistant to the Solicitor General
STEVEN L. LANE
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly affirmed the denial of petitioner's motion to vacate his conviction under 28 U.S.C. 2255 on the basis of ineffective assistance of counsel because petitioner did not demonstrate cause and prejudice for his failure to raise that claim on direct appeal of his conviction.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	2
Summary of argument	9
Argument:	
I. Claims asserting ineffective assistance of trial counsel should be subject to the general rule of procedural default that, when a claim is not raised on direct appeal, it can be considered on collateral review only upon a showing of cause and prejudice	12
A. A claim that is not raised on direct appeal generally cannot be asserted on collateral review absent a showing of cause and prejudice	13
B. Claims asserting ineffective assistance of counsel should not be exempt from the general rule of procedural default	15
1. Ineffective assistance claims often cannot be fairly raised or fully addressed on direct appeal	16
2. Applying the procedural default rule appropriately targets those ineffective assistance claims that could fairly be raised and resolved on direct appeal	20
3. Applying the procedural default rule to ineffective assistance claims promotes important societal interests	23
4. The procedural default rule is not unworkable, unfair, or unduly burdensome when applied to ineffective assistance claims	28

Table of Contents—Continued: Page

II. The court of appeals correctly denied petitioner's ineffective assistance of counsel claim under the procedural default rule 37
A. The court of appeals correctly concluded that petitioner's ineffective assistance claim is grounded solely in the record developed at trial 37
B. This court should affirm the judgment on the alternate ground that, even if petitioner can establish "cause," he cannot establish "prejudice" 45
Conclusion 46
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Abbamonte v. *United States*, 160 F.3d 922 (2d Cir. 1988) 33
Amiel v. *United States*, 209 F.3d 195 (2d Cir. 2000) 20, 33
Amin v. *State*, 774 P.2d 597 (Wyo. 1989) 36
Billy-Eko v. *United States*, 8 F.3d 111 (2d Cir. 1993) ..... *passim*
Bond v. *United States*, 1 F.3d 631 (7th Cir. 1993) 21
Bousley v. *United States*, 523 U.S. 614 (1998) 12, 13, 14, 21, 45
Brady v. *Maryland*, 373 U.S. 83 (1963) 22
Cain v. *State*, 712 So. 2d 1110 (Ala. Crim. App. 1997) 36
Chappell v. *United States*, 494 U.S. 1075 (1990) 15
Coleman v. *Thompson*, 501 U.S. 722 (1991) 14
Commonwealth v. *Chase*, 741 N.E.2d 59 (Mass. 2001) 36
Commonwealth v. *Moore*, 805 A.2d 1212 (Pa. 2002) 36

Cases—Continued: Page

Diaz-Albertini v. *United States*, 498 U.S. 1061 (1991) 15
Ellerby v. *United States*, 187 F.3d 257 (2d Cir. 1998) 34
Evitts v. *Lucey*, 469 U.S. 387 (1985) 17
Government of the Virgin Islands v. *Zepp*, 748 F.2d 125 (3d Cir. 1984) 24
Grice v. *United States*, No. 98-CV-622, 1998 WL 743718 (N.D.N.Y Oct. 15, 1998) 35
Guinan v. *United States*, 6 F.3d 468 (7th Cir. 1993) 18, 19, 26
James v. *United States*, No. 00-CIV-8818LAKGWG, 2002 WL 1023146 (S.D.N.Y. May 20, 2002) 35
Jones v. *State*, 479 N.W.2d 265 (Iowa 1991) 36
Kimmelman v. *Morrison*, 477 U.S. 365 (1986) 16, 18, 23
Knight v. *United States*, 37 F.3d 769 (1st Cir. 1994) 19
Kyles v. *Whitley*, 514 U.S. 419 (1995) 21
Little v. *United States*, 748 A.2d 920 (D.C. 2000) 36
Lockett v. *State*, 656 So. 2d 76 (Miss.), cert. denied, 515 U.S. 1150 (1995) 36
Maggard v. *State*, 11 P.3d 89 (Kan. Ct. App. 2000) 36
McCarver v. *Lee*, 221 F.3d 583 (4th Cir. 2000) 36
McCracken v. *State*, 946 P.2d 672 (Okla. Crim. App. 1997) 36
McCleese v. *United States*, 75 F.3d 1174 (7th Cir. 1996) ..... *passim*
Moskowtiz v. *United States*, No. 01-Civ-10644, 2002 WL 31119629 (S.D.N.Y. Sept. 24, 2002) 35
Murray v. *Carrier*, 477 U.S. 478 (1986) ..... *passim*
Pascual v. *Carver*, 876 P.2d 364 (Utah 1994) 36
Peets v. *United States*, 55 F. Supp. 2d 275 (S.D.N.Y. 1999) 35
People v. *Coady*, 622 N.E.2d 798 (Ill. 1993) 36
People v. *Wong*, 682 N.Y.S.2d 689 (N.Y. App. Div. 1998) 36

Cases—Continued: Page

Prewitt v. *United States*, 83 F.3d 812 (7th Cir. 1996) 20
Reed v. *Farley*, 512 U.S. 339 (1994) 13, 14
Reed v. *Ross*, 468 U.S. 1 (1984) 26, 27, 28, 35
Robledo-Kinney v. *State*, 637 N.W.2d 581 (Minn. 2002) 36
Saldarriaga v. *United States*, No. 99-CIV-4487, 2002 WL 449651 (S.D.N.Y. Mar. 21, 2002) 35
Smith v. *Murray*, 477 U.S. 527 (1986) 22
State v. *Courchene*, 847 P.2d 271 (Mont. 1992) 36
State. v. *Escalona-Naranjo*, 517 N.W.2d 157 (Wis. 1994) 36
State v. *Fair*, 557 S.E.2d 500 (N.C. 2001), cert. denied, 122 S. Ct. 2332 (2002) 36
State v. *Lentz*, 639 N.E.2d 784 (Ohio 1994) 36
State v. *Silva*, 864 P.2d 583 (Haw. 1993) 36
State v. *Williams*, 609 N.W.2d 313 (Neb. 2000) 36
Strickland v. *Washington*, 466 U.S. 668 (1984) 21, 22, 23, 40
Strickler v. *Greene*, 527 U.S. 263 (1999) 21, 22
Sullivan v. *United States*, 721 A.2d 936 (D.C. 1998) 36
United States v. *Ben Zvi*, 242 F.3d 89 (2d Cir. 2001) 34
United States v. *Brooks*, 125 F.3d 484 (7th Cir. 1997) 24
United States v. *Casamayor*, 837 F.2d 1509 (11th Cir. 1988), cert. denied, 488 U.S. 1017 (1989) 18
United States v. *Cronic*, 466 U.S. 648 (1984) 15
United States v. *DeRewal*, 10 F.3d 100 (3d Cir. 1993), cert. denied, 511 U.S. 1033 (1994) 18, 19
United States v. *Downs*, 123 F.3d 637 (7th Cir. 1997) 34
United States v. *Finley*, 245 F.3d 199 (2d Cir. 2001), cert. denied, 534 U.S. 1144 (2002) 24, 34
United States v. *Ford*, 918 F.2d 1343 (8th Cir. 1990) 23-24
United States v. *Frady*, 456 U.S. 152 (1982) 13, 14, 15, 23
United States v. *Fulton*, 5 F.3d 605 (2d Cir. 1993) 24

Cases—Continued: Page

United States v. *Galloway*, 56 F.3d 1239 (10th Cir. 1995) 18, 19
United States v. *Geraldo*, 271 F.3d 1112 (D.C. Cir. 2001) 30
United States v. *Haywood*, 155 F.3d 674 (3d Cir. 1998) 29, 30
United States v. *Headley*, 923 F.2d 1079 (3d Cir. 1991) 23
United States v. *Iorizzo*, 786 F.2d 52 (2d Cir. 1986) 24
United States v. *Jimenez Recio*, 258 F.3d 1069 (9th Cir. 2001), cert. granted on other grounds, 122 S. Ct. 2288 (2002) 23
United States v. *Kellum*, 42 F.3d 1087 (7th Cir. 1994) 18
United States v. *King*, 119 F.3d 290 (4th Cir. 1997) 29
United States v. *Leone*, 215 F.3d 253 2000) 30
United States v. *Loughery*, 908 F.2d 1014 (D.C. Cir. 1990) 24
United States v. *Mal*, 942 F.2d 682 (9th Cir. 1991) 18, 20
United States v. *Mala*, 7 F.3d 1058 (1st Cir. 1993), cert. denied, 511 U.S. 1086 (1994) 18
United States v. *Massaro*, 57 F.3d 1063 (2d Cir.), cert. denied, 516 U.S. 933 (1995) 2
United States v. *Neuhausser*, 241 F.3d 460 (6th Cir.), cert. denied, 122 S. Ct. 181 (2001) 29
United States v. *Patterson*, 215 F.3d 776 (7th Cir.), judgment vacated in part, 531 U.S. 1033 (2000) 24
United States v. *Pruitt*, 156 F.3d 638 (6th Cir. 1998), cert. denied, 525 U.S. 1091 and 526 U.S. 1012 (1999) 18, 20
United States v. *Reyes-Platero*, 224 F.3d 1112 (9th Cir. 2000), cert. denied, 531 U.S. 1117 (2001) 30
United States v. *Richardson*, 167 F.3d 621 (D.C. Cir.), cert. denied, 528 U.S. 895 (1999) 18, 29

Cases—Continued: Page

United States v. *Rivas*, 157 F.3d 364 (5th Cir. 1998) 29
United States v. *Russell*, 221 F.3d 615 (4th Cir. 2000) 24
United States v. *Sevick*, 234 F.3d 248 (5th Cir. 2000) 18, 20
United States v. *Smith*, 440 F.2d 521 (7th Cir. 1971) 25
United States v. *Smith*, 62 F.3d 641 (4th Cir. 1995) 18, 20
United States v. *Soto*, 132 F.3d 56 (D.C. Cir. 1997) 23
United States v. *Stantini*, 85 F.3d 9 (2d Cir.), cert. denied, 519 U.S. 1000 (1996) 33
United States v. *Stoia*, 22 F.3d 766 (7th Cir. 1994) 33
United States v. *Swan* n, 943 F.2d 1070 (9th Cir. 1991) 23
United States v. *Swartz*, 975 F.2d 1042 (4th Cir. 1992) 23
United States v. *Tatum*, 943 F.2d 370 (4th Cir. 1991) 23
United States v. *Thompson*, 972 F.2d 201 (8th Cir. 1992) 18, 20
United States v. *Timmreck*, 441 U.S. 780 (1979) 14, 25
United States v. *Trevino*, 60 F.3d 333 (7th Cir. 1995), cert. denied, 516 U.S. 1061 (1996) 31
United States v. *Williams*, 205 F.3d 23 (2d Cir.), cert. denied, 513 U.S. 885 (2000) 34
United States v. *Workman*, 80 F.3d 688 (2d Cir.), cert. denied, 519 U.S. 938 and 955 (1996) 34
Wainwright v. *Sykes*, 433 U.S. 72 (1977) 13, 27
White v. *Kelso*, 401 S.E.2d 733 (Ga. 1991) 36
Wood v. *Georgia*, 450 U.S. 261 (1981) 17

Statutes and rule:

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 105, 110 Stat. 1220 ..... 26, 30
18 U.S.C. 892 2
18 U.S.C. 893 2

Statutes and rule—Continued: Page

18 U.S.C. 894 2
18 U.S.C. 1951 2
18 U.S.C. 1952 2
18 U.S.C. 1959(a)(1) 2
18 U.S.C. 1962(c) 2
18 U.S.C. 1962(d) 2
28 U.S.C. 2255 ..... *passim*
28 U.S.C. 2255 para. 6(1) 26
28 U.S.C. 2255 para. 8 30
Fed. R. Crim. P. 33 24

Miscellaneous:

Anne M. Voigts, Note, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 Colum. L. Rev. 1103 (1999) 36

In the Supreme Court of the United States

No. 01-1559

JOSEPH MASSARO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A10) is not published in the Federal Reporter, but is available at 27 Fed. Appx. 26. The opinion of the district court (Pet. App. A16-A26) also is not published in the Federal Reporter.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 2001. A petition for rehearing was denied on January 14, 2002. Pet. App. A1-A2. The petition for a writ of certiorari was filed on April 15, 2002, and was granted on October 1, 2002. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-2a.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to conduct and participate in the conduct of the affairs of a racketeering enterprise, in violation of 18 U.S.C. 1962(d); participating in the conduct of the affairs of a racketeering enterprise, in violation of 18 U.S.C. 1962(c); murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1); three counts of conspiracy to commit extortion, in violation of 18 U.S.C. 1951; conspiracy to make extortionate extensions of credit and to use extortionate means to collect extensions of credit, in violation of 18 U.S.C. 892, 894; loansharking, in violation of 18 U.S.C. 893; and traveling interstate in aid of the extortion counts, in violation of 18 U.S.C. 1952. Pet. App. A31. Petitioner was sentenced to life imprisonment and a $240,000 fine, and was ordered to pay $104,100 in restitution. *Id.* at A18; Pet. 4. The court of appeals affirmed. *United States* v. *Massaro*, 57 F.3d 1063 (2d Cir.) (Table) (*reprinted in* Pet. App. A30-A37), cert. denied, 516 U.S. 933 (1995).

Petitioner then filed a motion under 28 U.S.C. 2255 challenging his convictions. The district court denied the motion. Pet. App. A16-A26. The court of appeals affirmed. *Id.* at A3-A10.

1. From at least the late 1970s until his arrest on June 24, 1992, petitioner Joseph Massaro was a "soldier" in the Luchese Organized Crime Family and actively participated in its various illicit affairs. As a

Luchese soldier, petitioner's racketeering activity included using threats, violence, extortion and arson to secure and expand his control over the topless bar industry in Long Island, New York, extorting several other business establishments, and operating a loansharking business throughout Long Island, Brooklyn, and Queens, as well as a horse betting parlor in Queens. Pet. App. A4-A5, A31-A33.

On September 20, 1990, petitioner murdered his racketeering associate, Joseph Fiorito, because of Fiorito's failure to remit gambling proceeds and other monies. Petitioner enlisted the help of Patrick Esposito, another racketeering associate, to lure Fiorito to a vacant house in Hauppauge, Long Island, by telling Fiorito that they were going to commit an arson at the home. Petitioner was waiting in the basement of the house. Esposito asked Fiorito to go to the basement for some gasoline and rags, and when Fiorito went down the stairs, petitioner shot him in the head. Petitioner and Esposito then carried Fiorito's body up the stairs and through the first floor into the garage. They placed the body in a sitting position in the rear passenger seat of Fiorito's car, with the head resting on the middle of the seat over the transmission hump. Pet. App. A5, A18-A19, A33; Trial Tr. 371-444.

As petitioner and Esposito drove away from the murder site in Fiorito's car, petitioner expressed concern that Fiorito was not dead and shot him a second time. Petitioner instructed Esposito to park Fiorito's car in a residential area in Queens, and to pull Fiorito's body across the back seat so that Fiorito would appear to be asleep. Petitioner and Esposito then got into a car driven by Joseph Kern, another of petitioner's associates. At petitioner's direction, Kern and another man returned to the vacant house later that day and recov-

ered the shell casing from the first shot. Esposito confessed to his girlfriend on returning home that "they" had just killed Fiorito. Pet. App. A19, A33; Trial Tr. 431-444.

In the early morning of September 21, 1990, a New York City Police Officer discovered Fiorito's body in his parked car. When the police removed the body, they discovered a spent shell casing on the floor behind the passenger seat, but did not find a bullet. Later that same day, the police, alerted by Esposito's girlfriend, arrested Esposito outside his home and recovered his bloodstained clothing from a dumpster. Esposito agreed to cooperate with police and implicated petitioner in the crime. Subsequently, the medical examiner determined that the bullet from the initial shot fired in the house remained lodged in Fiorito's brain in fragments and that the bullet from the second shot fired in the car had passed through and exited his head. Pet. App. A19, A33; Trial Tr. 438-448, 1529-1532, 1586.

2. On September 6, 1993, the day before opening statements in petitioner's trial, the new owner of Fiorito's car notified police investigators that, while removing the carpet and insulation in the rear of the car, he had discovered a bullet, as well as a hole in the carpet near the transmission hump. Government prosecutors were notified of the development the following day, September 7, 1993. They informed petitioner's counsel of the bullet's discovery by a faxed letter on Saturday, September 11, 1993, and explained that a ballistics laboratory was conducting testing on the bullet. J.A. 176-177. In the meantime, defense counsel had delivered an opening statement arguing that Esposito had murdered Fiorito alone and that no scientific evidence linked petitioner to the crime. The government made no reference to the bullet in its

opening statement. Pet. App. A5, A29, A34; J.A. 42- 43, 50-55; Trial Tr. 39-42.[1]

When trial resumed on Monday, September 13, 1993, defense counsel did not request a continuance or otherwise raise any issue concerning the bullet. Defense counsel first broached the subject of the bullet with the court ten days later, on September 23, 1993, when counsel sought to expedite the government's ballistics tests. The government advised the court that, because forensic reports were not yet available, it had not decided whether to introduce the bullet into evidence. Before trial resumed on Monday, September 2', 1993, the government informed defense counsel that the ballistics expert had concluded that the bullet matched the shell fragments found in Fiorito's head and had been fired from the same gun. At defense counsel's request, the government made the bullet and shell fragments available for examination by a defense expert. Pet. App. A34; J.A. 24-25, 178-179.

On the following day, September 28, 1993, defense counsel moved for a mistrial, or, in the alternative, to preclude the admission of the bullet into evidence, on the basis of the government's belated disclosure of the bullet. J.A. 19, 25; Pet. App. A35. In connection with that motion, counsel claimed that the new evidence severely undermined the defense theory chosen in advance of trial. That strategy, which entailed arguing that petitioner was not in the car and that Esposito's

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[1] When asked by the district court about the delay in disclosing the discovery of the bullet, the prosecutor explained that he had waited to inform petitioner's trial counsel because, initially, he was informed that the bullet could not be linked to Fiorito's murder. J.A. 50-51. Petitioner's trial counsel advised the district court that he did not believe the government had acted in bad faith. J.A. 30-31.

account of the murder was not credible, was based in part on the absence of any blood spatter or scientific evidence indicating that a hot had been fired in Fiorito's car. Defense counsel acknowledged that a shell casing had been found in the car when Fioroto's body was first discovered, but argued that, notwithstanding the shell casing, the absence of a bullet in the car was critical to the defense case. J.A. 16-24.

The district court found that the circumstances did not justify a mistrial. J.A. 24-26, 30. The court also concluded that the bullet could be admitted into evidence on the basis that the government's delay had not irreparably prejudiced petitioner's defense. Pet. App. A20, A35; J.A. 73-108. The court explained that the bullet did not physically link petitioner to Fiorito's murder, and therefore did not compromise the defense's argument that no scientific evidence placed petitioner in the car or connected him to the crime. Instead, the bullet only tended to corroborate Esposito's account of the events. J.A. 81-83.

At the same time, the district court repeatedly offered defense counsel a continuance to examine the bullet and to adjust his defense strategy if necessary, and ruled that petitioner could recall any of the witnesses who had previously testified. Pet. App. A14, A35; J.A. 20, 24, 55-56, 89-101, 107-108. Defense counsel declined the offer of a continuance, explaining that a continuance was not necessary for the defense ballistics expert to examine the bullet.[2] Counsel also argued that there

[2] Petitioner had retained a ballistics expert by the time he moved for a mistrial, J.A. 20, and petitioner's expert soon reached agreement with the government's conclusion that the bullet matched the shell fragments recovered from Fiorito's head, J.A. 55. Pet. App. A7.

would be no use in obtaining a continuance because the bullet had irreparably damaged his plans to argue that there had been no shooting in the car. J.A. 20-21, 24-25. Defense counsel did elect, however, to recall one of the crime scene investigators. J.A. 107-109.

3. On appeal, petitioner retained new counsel, who argued, *inter alia*, that the district court had erred in admitting the bullet into evidence. The court of appeals affirmed. Pet. App. A30-A37.

The court of appeals, like the district court, concluded that the government's belated disclosure of the bullet's discovery, while "regrettable," did "not irreparably damage [petitioner's] strategy." Pet. App. A36. In particular, the court observed, "[n]othing in [petitioner's] opening statement * * * was rendered false by the bullet evidence" and "the defense had ample other detrimental information with which to attack Esposito's credibility." *Ibid.* The court added that its conclusion was supported by trial counsel's decision to decline a continuance, explaining that petitioner's "decision to proceed with his strategy despite his knowledge that the bullet might be matched to existing shell fragments weakens his claim" of "substantial prejudice." *Id.* at A37. Petitioner's appellate counsel did not raise a claim on appeal that trial counsel had rendered ineffective assistance by forgoing a continuance after learning about the bullet.

4. On April 24, 1997, petitioner filed a motion under 28 U.S.C. 2255 seeking to vacate his conviction. Pet. App. A11. The motion asserted, *inter alia*, that trial counsel's failure to accept the district court's offer of a continuance amounted to ineffective assistance of counsel. Petitioner argued that, if trial counsel had accepted a continuance, he could have mounted a more persuasive challenge to the bullet evidence and to

Esposito's testimony about the murder. Pet. App. A6, A20. In connection with the motion, petitioner submitted the opinions of three newly-retained experts who attempted to cast doubt on the ballistics evidence and on Esposito's account of Fiorito's murder. J.A. 143-175. The expert opinions argued generally that Esposito's account of the murder was suspect, but none of the opinions challenged the conclusion of both the government's and petitioner's ballistics experts that the bullet matched the shell fragments recovered from Fiorito's head.

The district court denied petitioner's Section 2255 motion. Pet. App. A16-A26. Relying on *Billy-Eko* v. *United States*, 8 F.3d 111 (2d Cir. 1993), the court found petitioner's claim that trial counsel was ineffective for failing to seek a continuance to be procedurally barred because the claim could have been raised on direct appeal and petitioner could not establish cause or prejudice for his default. Pet. App. A24-A25. The district court granted petitioner a certificate of appealability limited to that issue. *Id.* at A27.[3]

5. The court of appeals affirmed. Pet. App. A3-A10. The court explained that, under its decision in *Billy Eko*, *supra*, the failure of a defendant to raise a claim of ineffective assistance of counsel on direct appeal constitutes a procedural default if new counsel represents the defendant on appeal and if the claim is based solely on the record already developed at trial. Pet. App. A7. Applying those standards to this case, the court concluded that petitioner could have raised on direct

[3] The court of appeals subsequently expanded the certificate of appealability to include a second claim concerning whether trial counsel had been ineffective in failing to call petitioner to testify at trial. Pet. App. A28-A29. That claim is not before this Court.

appeal his claim that trial counsel rendered ineffective assistance in failing to accept a continuance.

The court first observed that new counsel represented petitioner on direct appeal. Next, it determined that petitioner's claim of ineffective assistance was "based solely on the record adduced at trial and available to [his] appellate counsel on direct appeal." Pet. App. A7. The court explained in that regard that petitioner's trial "counsel engaged in many discussions about the decision not to accept a continuance" in the trial record. *Ibid.* The court added that, although "a new set of experts allegedly reached different conclusions after trial" about the ballistics evidence, that did "not render the basis for [petitioner's] ineffective assistance claim outside the scope of the record adduced at trial." *Ibid.* "Moreover," the court explained, "each of the issues raised by [petitioner's] most recent forensic analysis—the absence of blood in the vehicle, the absence of blood 'spatter' or other remnants, the belated discovery of the bullet after several searches—all were extensively addressed at trial." *Id.* at A7-A8. As a result, the court concluded, "the record available to [petitioner's] appellate counsel fully revealed the implications of the failure to accept a continuance." *Id.* at A8. Because petitioner was unable to demonstrate cause for having failed to raise his claim on direct appeal, the court found his claim of ineffective assistance of trial counsel to be procedurally barred. *Ibid.*

SUMMARY OF ARGUMENT

I. A basic principle of procedural default is that the failure to raise a claim on direct appeal bars assertion of the claim on collateral review absent a showing of cause

and prejudice. Petitioner's principal argument is that procedural default rules should have no application to claims asserting ineffective assistance of trial counsel. That argument rests on the recognition that most ineffectiveness claims cannot fairly be expected to be raised and addressed on direct appeal, either because the factual basis for a claim is not fully developed in the trial record, or because, when trial counsel continues to represent the defendant on appeal, it is unreasonable to expect counsel to argue his own ineffectiveness. Petitioner's bright-line approach would be easy to administer, and would avoid the need to apply the cause-and-prejudice standard to identify those ineffectiveness claims that can fairly be expected to be raised and resolved on direct appeal.

While those considerations have force, the better approach on balance is to apply the procedural default rule to ineffective assistance claims. The fact that *many* ineffective assistance claims cannot fairly be raised and resolved on direct appeal does not mean that *no* ineffectiveness claim should be required to be asserted on direct appeal. When the factual basis for a claim is fully developed in the record on appeal and new counsel represents the defendant on appeal, it is reasonable to require the claim to be raised at that time. And when those conditions are not present, the defendant would establish "cause" for not asserting the claim on appeal. Channeling ineffective assistance claims to direct appeal rather than collateral review in appropriate situations serves the general societal interests in respecting the finality of criminal judgments and encouraging resolution of legal challenges to convictions at the earliest feasible opportunity.

The Second Circuit and Seventh Circuit are thus correct to apply the procedural default rule to ineffective assistance claims, and to refuse to entertain an ineffectiveness claim on collateral review when new counsel represented the defendant on appeal and the claim is based solely on the record developed at trial. Administering that rule does not impose undue burdens on courts and litigants, and the rule does not work unfairness against defendants. When a defendant fears that his ineffectiveness claim may be procedurally defaulted if he waits to assert it in a motion under 28 U.S.C. 2255, he can raise the claim on direct appeal while explaining to the court that further factual development would advance the claim. In that situation, the court of appeals would resolve the claim if it is able to rule definitively in one direction or the other, or, if the claim cannot be resolved, would decline to decide the claim and allow the defendant to raise it on collateral review. In either case, the defendant will not have been unfairly prejudiced.

II. The court of appeals correctly ruled that petitioner procedurally defaulted his ineffective assistance claim by failing to raise it on direct review. Petitioner's claim alleges that trial counsel was ineffective in failing to accept a continuance upon learning of the discovery of the bullet in the car in which Fiorito's body was found. Petitioner was represented by new counsel on appeal, and trial counsel's reasons for declining to accept a continuance are fully developed in the trial record. Contrary to petitioner's argument, moreover, the expert affidavits filed in connection with his Section 2255 motion do not constitute extrinsic evidence that bears on the prejudice prong of his ineffectiveness claim. Each of the arguments raised in the affidavits was made at trial. The affidavits therefore do not ad-

vance petitioner's argument on the prejudice allegedly caused by trial counsel's failure to accept a continuance. Accordingly, petitioner cannot establish "cause" for failing to raise his ineffectiveness claim on direct appeal.

Even if petitioner could establish "cause," this Court should affirm the judgment on the alternate ground that petitioner cannot establish "prejudice." The prejudice inquiry for cause-and-prejudice purposes is coextensive with the prejudice prong of the underlying ineffectiveness claim. Petitioner cannot establish that, if trial counsel had accepted a continuance, there is a reasonable probability that the result at trial would have been different. None of the theories raised in petitioner's expert affidavits challenges the ballistics tests establishing that the bullet matches shell fragments found in Fiorito's head. The affidavits thus offer no explanation for how the bullet ended up in the car other than the one proved by the government at trial.

ARGUMENT

I. CLAIMS ASSERTING INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL SHOULD BE SUBJECT TO THE GENERAL RULE OF PROCEDURAL DEFAULT THAT, WHEN A CLAIM IS NOT RAISED ON DIRECT APPEAL, IT CAN BE CONSIDERED ON COLLATERAL REVIEW ONLY UPON A SHOWING OF CAUSE AND PREJUDICE

A basic principle of procedural default is that the failure to raise a claim on direct appeal bars its assertion on collateral review absent a demonstration of cause and prejudice. See, *e.g.*, *Bousley* v. *United States*, 523 U.S. 614, 621-622 (1998). The issue in this case is whether claims alleging ineffective assistance of trial counsel—as a class—should be excepted from the procedural default rule. While many ineffective assistance

claims cannot be properly litigated on direct appeal, others can be. The normal rules of procedural default thus should be applied in this context, in order to promote respect for the finality of criminal judgments and to encourage resolution of legal challenges at the earliest feasible opportunity.

A. A Claim That Is Not Raised On Direct Appeal Generally Cannot Be Asserted On Collateral Review Absent A Showing Of Cause And Prejudice

Section 2255 "is an extraordinary remedy and 'will not be allowed to do service for an appeal.'" *Bousley*, 523 U.S. at 621 (quoting *Reed* v. *Farley*, 512 U.S. 339, 354 (1994)); see *United States* v. *Frady*, 456 U.S. 152, 165 (1982). Accordingly, the failure of a defendant to raise a claim on direct appeal generally constitutes a procedural default that bars consideration of the claim on collateral review. *Bousley*, 523 U.S. at 621; *Reed*, 512 U.S. at 354. In particular, "[w]here a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised [under Section 2255] only if the defendant can first demonstrate * * * 'cause' and actual 'prejudice.'" *Bousley*, 523 U.S. at 622; see *Reed*, 512 U.S. at 354 ("Where the petitioner—whether a state or federal prisoner—failed properly to raise his claim on direct review, the writ is available only if the petitioner establishes 'cause' for the waiver and shows 'actual prejudice resulting from the alleged . . . violation.'") (quoting *Wainwright* v. *Sykes*, 433 U.S. 72, 84 (1977)); *Frady*, 456 U.S. at 167-168.[4]

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[4] In the absence of a showing of "cause" and "prejudice," a demonstration of "actual innocence" would allow assertion of a defaulted claim on collateral review. See *Bousley*, 523 U.S. at 622; *Murray* v. *Carrier*, 477 U.S. 478, 495-496 (1986). The exception for actual innocence is not at issue in this case.

The strict limitations on collateral review of claims not presented on direct appeal reflect the basic societal interest in respecting final criminal judgments. See *Frady*, 456 U.S. at 164 (recognizing the "legitimate interest in the finality of [a] judgment * * * perfected by the expiration of the time allowed for direct review or by the affirmance of the conviction on appeal"); *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979) (discussing "the concern with finality served by the limitation on collateral attack"). "Once the defendant's chance to appeal has been waived or exhausted," this Court has explained, "we are entitled to presume he stands fairly and finally convicted, especially when * * * he already has had a fair opportunity to present his federal claims to a federal forum." *Frady*, 456 U.S. at 164. A defendant's "fair opportunity to present his federal claim to a federal forum" includes his direct appeal, *ibid.*, and his "[f]ailure to raise a claim on appeal reduces the finality of appellate proceedings" and "deprives the appellate court of an opportunity to review trial error," *Murray* v. *Carrier*, 477 U.S. 478, 491 (1986). Raising the claim on collateral review in that situation therefore requires a showing of cause and prejudice. *Bousley*, 523 U.S. at 621; *Reed*, 512 U.S. at 354.[5]

[5] When a federal court conducts habeas review of a state court conviction, the requirement to show cause and prejudice to overcome a state law procedural bar rests on both considerations of comity and the interest in finality. See, *e.g.*, *Coleman* v. *Thompson*, 501 U.S. 722, 730 (1991). Although collateral review of federal convictions under Section 2255 does not implicate concerns of comity, the limitation on collateral review of claims that were not raised on direct appeal applies with full force to review under Section 2255. See *Bousley*, 523 U.S. at 621; *Reed*, 512 U.S. at 354. That is because "the Federal Government, no less than the States, has an interest in the finality of its criminal judgments." *Frady*, 456 U.S. at 166.

B. Claims Asserting Ineffective Assistance Of Counsel Should Not Be Exempt From The General Rule Of Procedural Default

Petitioner argues (Br. 21-29) that claims asserting ineffective assistance of trial counsel should be categorically excepted from the procedural default rule, and thus should be heard on collateral review even if they could have been raised and resolved on direct appeal, without any need to demonstrate cause and prejudice. A bright-line rule to that effect would have certain advantages, and the government advocated that approach some time ago. See *United States* v. *Cronic*, 466 U.S. 648, 667 n.42 (1984); see also *Billy-Eko* v. *United States*, 509 U.S. 901 (1993); *Diaz-Albertini* v. *United States*, 498 U.S. 1061 (1991); *Chappell* v. *United States*, 494 U.S. 1075 (1990). That approach is straightforward to administer, and avoids the expenditure of judicial resources on applying the cause-and-prejudice standard to ineffectiveness claims, with the goal of identifying that set of claims that could fairly be raised and resolved on direct appeal.

On balance, however, adhering to the procedural default rule in the context of ineffective assistance claims is more in keeping with this Court's general application of procedural default principles. It is also more consistent with the attendant societal interests in according respect to final criminal judgments and encouraging resolution of claims at the earliest feasible opportunity. Advancement of those interests would not come at the cost of unfairness, because a defendant would be required to raise an ineffectiveness claim on direct appeal only if he were represented by new

counsel and the factual basis for the claim were fully developed in the record. The experience of the Second and Seventh Circuits and of the many States that apply the procedural default rule to ineffective assistance claims shows that the rule's application in that context is not unworkable and does not impose unwarranted burdens on judicial administration. For those reasons, claims alleging ineffective assistance of counsel should not be exempt from the general rule that, if a claim was not raised on direct appeal, its consideration on collateral review is conditioned upon a showing of cause and prejudice.[6]

1. Ineffective assistance claims often cannot be fairly raised or fully addressed on direct appeal

a. Petitioner's argument for a blanket exception to the procedural default rule for ineffective assistance claims begins with the recognition that many ineffective assistance claims cannot fairly be expected to be raised and resolved on direct appeal. Pet. Br. 22-23. That is the case for two separate reasons.

First, if the same lawyer represents the defendant at trial and on appeal, it is unrealistic to expect that lawyer to argue on appeal that his own performance at trial was ineffective. See *Kimmelman* v. *Morrison*, 477 U.S. 365, 378 (1986) ("Indeed, an accused will often not realize that he has a meritorious ineffectiveness claim until he begins collateral review proceedings, *particularly if he retained trial counsel on direct appeal.*") (emphasis added); *Billy-Eko* v. *United States*, 8 F.3d 111, 114 (2d Cir. 1993) ("[E]ven the scrupulous attorney searching the record in good faith would likely be blind to his derelictions at the trial level."); cf. *Wood* v. *Georgia*, 450 U.S. 261, 265 n.5 (1981) ("The party who argued the appeal and prepared the petition for certiorari was the lawyer on whom the conflict-of-interest charge focused. It is unlikely that he would concede that he had continued improperly to act as counsel."); *Evitts* v. *Lucey*, 469 U.S. 387, 391 n.3 (1985) (noting that counsel was referred to bar "disciplinary proceedings for 'attacking his own work'").

Second, even if new counsel represents a defendant on direct appeal, the grounds for an ineffective assistance claim often either are not apparent from the trial record or are not sufficiently developed to permit meaningful consideration of the claim on appeal. As the Second Circuit has explained:

> Ineffective assistance claims are often based on assertions that trial counsel made errors of omission, errors that are difficult to perceive from the record: for example, neglecting to call certain witnesses or introduce certain evidence. The claims might also be based on a conflict of interest not apparent at trial. Proof is sometimes provided in attorney-client correspondence, or in other documents not introduced at trial. Even if a new attorney represents the accused on direct appeal, she might not come across reasons to suspect ineffective assistance in preparing a direct appeal.

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[6] In its brief in opposition to the petition for certiorari in this case, the government argued that this Court need not grant review to establish a uniform national rule on the circumstances in which the failure to raise an ineffectiveness claim on direct appeal bars its assertion on collateral review. See Br. in Opp. 11-13. The grant of certiorari, however, squarely presents the Court with a choice among competing approaches, and the government submits, in light of its experience with the different approaches over the years, that the approach of the Second and Seventh Circuits is workable and fair.

Billy-Eko, 8 F.3d at 114 (citations omitted); see *McCleese* v. *United States*, 75 F.3d 1174, 1178 (7th Cir. 1996). As a result, resolution of most ineffective assistance claims requires additional proceedings in the district court on collateral review, at which the defendant can present evidence about counsel's allegedly deficient performance and its effect on the verdict, and trial counsel can shed added light on his or her representation. See *Kimmelman*, 477 U.S. at 378-379 n.3.

b. For those reasons, the courts of appeals agree that ineffectiveness claims frequently should be addressed in the first instance by the district courts on collateral review.[7] At the same time, because an ineffectiveness claim can be fully and fairly resolved on direct appeal in certain situations, and because defendants desire to have the claim addressed on direct appeal in some circumstances, all courts of appeals allow the assertion of an ineffectiveness claim on direct appeal. See *Guinan* v. *United States*, 6 F.3d 468, 472 (7th Cir. 1993). The courts of appeals disagree on whether, with respect to those ineffectiveness claims that could be raised and addressed on direct appeal,

[7] See, *e.g.*, *United States* v. *Mala*, 7 F.3d 1058, 1063 (1st Cir. 1993), cert. denied, 511 U.S. 1086 (1994); *Billy-Eko*, 8 F.3d at 114; *United States* v. *DeRewal*, 10 F.3d 100, 103-104 (3d Cir. 1993), cert. denied, 511 U.S. 1033 (1994); *United States* v. *Smith*, 62 F.3d 641, 651 (4th Cir. 1995); *United States* v. *Sevick*, 234 F.3d 248, 252 (5th Cir. 2000); *United States* v. *Pruitt*, 156 F.3d 638, 646 (6th Cir. 1998), cert. denied, 525 U.S. 1091 and 526 U.S. 1012 (1999); *United States* v. *Kellum*, 42 F.3d 1087, 1094-1095 (7th Cir. 1994); *United States* v. *Thompson*, 972 F.2d 201, 203-204 (8th Cir. 1992); *United States* v. *Mal*, 942 F.2d 682, 689 (9th Cir. 1991); *United States* v. *Galloway*, 56 F.3d 1239, 1240 (10th Cir. 1995) (en banc); *United States* v. *Casamayor*, 837 F.2d 1509, 1516 (11th Cir. 1988), cert. denied, 488 U.S. 1017 (1989); *United States* v. *Richardson*, 167 F.3d 621, 626 (D.C. Cir.), cert. denied, 528 U.S. 895 (1999).

failure to present the claim on appeal is subject to the general rule of procedural default barring assertion of the claim under Section 2255 absent a showing of cause and prejudice.

Some courts of appeals, in accord with petitioner's position in this case, hold that the failure to raise an ineffective assistance claim on direct appeal can never constitute a procedural default subject to the "cause and prejudice" limitation. Those courts permit defendants to raise a claim of ineffective assistance of counsel for the first time on collateral attack without showing cause and prejudice, even if the claim could have been fully considered and resolved on direct appeal. See *United States* v. *Galloway*, 56 F.3d 1239, 1242-1243 (10th Cir. 1995) (en banc); *United States* v. *DeRewal*, 10 F.3d 100, 103-105 (3d Cir. 1993), cert. denied, 511 U.S. 1033 (1994); see also *Knight* v. *United States*, 37 F.3d 769, 774 (1st Cir. 1994) ("[T]he failure to bring a claim of ineffective assistance of counsel on direct appeal is not subject to the cause and prejudice standard.").

By contrast, the Second and Seventh Circuits, in agreement with the government's position in this case, do not categorically exempt ineffectiveness claims from the procedural default rule. Those courts recognize that, "in most cases there is good reason to allow a defendant to make ineffective assistance claims on collateral attack even if those claims were not brought on direct appeal." *Billy-Eko*, 8 F.3d at 114 (2d Cir.); *McCleese* 75 F.3d at 1178 (7th Cir.); see *Guinan*, 6 F.3d at 471 (7th Cir.). Those courts hold, however, that where a defendant is represented by new counsel on appeal and his ineffectiveness claim is grounded solely in the trial record, failure to raise the claim on direct appeal is a procedural default requiring a showing of cause and prejudice to bring the claim on collateral

review. *McCleese*, 75 F.3d at 1178; *Billy-Eko*, 8 F.3d at 115-116. The approach of the Second and Seventh Circuits, in our view, is sound.[8]

2. Applying the procedural default rule appropriately targets those ineffective assistance claims that could fairly be raised and resolved on direct appeal

Application of the procedural default rule to ineffective assistance claims bars collateral review only of those ineffectiveness claims that could reasonably be expected to be raised on direct appeal. First, if the defendant was represented by the same attorney at trial and on direct appeal, he would establish "cause" for not having raised an ineffectiveness claim on appeal. See *Prewitt* v. *United States*, 83 F.3d 812, 816 (7th Cir. 1996); *Billy-Eko*, 8 F.3d at 115. In addition, if the factual basis for an ineffectiveness claim were not fully developed in the record on direct appeal, there also would be "cause" for failing to assert the claim on appeal. See, *e.g.*, *Amiel* v. *United States*, 209 F.3d 195, 198 (2d Cir. 2000) (holding that an ineffective assistance claim could be asserted on collateral review because it was based on "events outside the trial record, namely, counsel's alleged off- the-record statements and alleged

[8] Other courts of appeals, while allowing ineffectiveness claims to be raised on direct appeal, have expressed a general preference that those claims be brought in a motion under Section 2255. See, *e.g.*, *Smith*, 62 F.3d at 651 (4th Cir.); *Sevick*, 234 F.3d at 251 (5th Cir.); *Pruitt*, 156 F.3d at 646 (6th Cir.); *Thompson*, 972 F.2d at 203-204 (8th Cir.); *Mal*, 942 F.2d at 689 (9th Cir.). Those courts have not squarely addressed whether, for those ineffectiveness claims that could be addressed on direct appeal, failure to present the claim on appeal is subject to the procedural default rule.

disloyal[ty]" to the defendant); see also *Bond* v. *United States*, 1 F.3d 631, 636-637 (7th Cir. 1993).[9]

If "cause" were established on either of those grounds, there would be no bar against collateral review on the merits. That is because the remaining requirement to show "prejudice" is coextensive with the "prejudice" prong of the underlying claim of ineffective assistance. This Court has described the two inquiries in precisely equivalent terms. Compare *Strickler* v. *Greene*, 527 U.S. 263, 289 (1999) (prejudice prong of cause-and-prejudice test entails showing that, absent the alleged error, "'there is a reasonable probability' that the result of the trial would have been different") (quoting *Kyles* v. *Whitley*, 514 U.S. 419, 434 (1995)), with *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984) (prejudice prong of ineffective assistance test requires

[9] The procedural default rule requires raising on direct appeal legal claims that arise from the trial, and any asserted explanation for the failure to raise a claim on appeal—such as an insufficient development of the factual basis for the claim or the unfairness of expecting an attorney to argue his own ineffectiveness on appeal—pertains to whether there is "cause" for not asserting the claim. See *Carrier*, 477 U.S. at 488 ("a showing that the factual * * * basis for the claim was not reasonably available to counsel * * * would constitute cause"). Even assuming, however, that those sorts of considerations bear on the antecedent question whether there is a procedural default at all—rather than the question of "cause" for a default, *cf. Bousley*, 523 U.S. at 621 (suggesting "an exception to the procedural default rule for claims that could not be presented without further factual development")—the Court should hold that at least those ineffectiveness claims where the defendant has new counsel on appeal and the factual basis for the claim is fully developed are procedurally defaulted if not raised on direct appeal. Under either approach, the ability to raise a claim on collateral review turns on whether the defendant was represented by new counsel on appeal and the factual basis for the claim was developed in the trial record.

demonstrating "that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different"). In *Strickler* v. *Greene*, *supra*, in fact, the Court collapsed its analysis of prejudice for "cause and prejudice" purposes into its analysis of materiality on the underlying claim under *Brady* v. *Maryland*, 373 U.S. 83 (1963), see 527 U.S. at 282, 289, 296, and the *Brady* test for materiality mirrors the *Strickland* test for prejudice, see *Strickland*, 466 U.S. at 694 ("appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution"). As a result, once a defendant establishes "cause" for failing to raise an ineffectiveness claim on direct appeal, the inquiry effectively shifts to the merits of the substantive claim.[10]

[10] Conceivably, a defendant could establish "cause" not just on the grounds that trial counsel continued to represent him on appeal or that the factual basis for the claim was not fully developed, but also on the ground that appellate counsel was constitutionally ineffective in failing to preserve the claim of trial counsel's ineffectiveness. See *Carrier*, 477 U.S. at 488 ("Ineffective assistance of counsel * * * is cause for a procedural default."); *McCleese*, 75 F.3d at 1180 (rejecting claim that appellate counsel was ineffective in failing to preserve ineffectiveness claim). As this Court has made clear when addressing the failure of appellate counsel to preserve a claim, however, "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause," *Carrier*, 477 U.S. at 486, nor does a deliberate decision not to press the claim in order to emphasize other claims perceived as more likely to prevail, *Smith* v. *Murray*, 477 U.S. 527, 535-536 (1986).

3. *Applying the procedural default rule to ineffective assistance claims promotes important societal interests*

a. By channeling the resolution of ineffective assistance claims to direct appeal instead of collateral review in appropriate situations—where new counsel represents the defendant on appeal and the claim is fully developed in the trial record—the procedural default rule advances the basic societal interest in respecting the finality of criminal judgments. See *Carrier*, 477 U.S. at 491; *Frady*, 456 U.S. at 164-165 ("Our trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless postconviction collateral attacks. To the contrary, a final judgment commands respect.").

In certain cases, the factual basis for a claim of ineffective assistance is sufficiently developed in the trial record to permit adjudication of the claim on direct appeal. See *Strickland*, 466 U.S. at 697 (assuming resolution of "ineffectiveness claims * * * on direct appeal"); see also *Kimmelman*, 477 U.S. at 380 (discussing "ineffective-assistance claim asserted on direct review"). In such a case, the record on direct appeal might conclusively demonstrate a defendant's entitlement to relief. A number of decisions have granted relief on direct appeal on the ground that trial counsel rendered ineffective assistance.[11]

[11] See *United States* v. *Jimenez Recio*, 258 F.3d 1069, 1074 (9th Cir. 2001), cert. granted on other grounds, 122 S. Ct. 2288 (2002); *United States* v. *Soto*, 132 F.3d 56, 59 (D.C. Cir. 1997); *United States* v. *Swartz*, 975 F.2d 1042, 1050 (4th Cir. 1992); *United States* v. *Tatum*, 943 F.2d 370, 379-380 (4th Cir. 1991); *United States* v. *Swanson*, 943 F.2d 1070 (9th Cir. 1991); *United States* v. *Headley*, 923 F.2d 1079 (3d Cir. 1991); *United States* v. *Ford*, 918 F.2d 1343,

Conversely, the record might establish that the ineffectiveness claim could never prevail. That might be the case because, as a matter of law, the attorney's performance could not have prejudiced the defendant. *E.g.*, *United States* v. *Finley*, 245 F.3d 199, 204 (2d Cir. 2001) (failure to move for judgment of acquittal could not have affected trial outcome because district court, as a matter of law, could not have granted the motion), cert. denied, 534 U.S. 1144 (2002); *McCleese*, 75 F.3d at 1179 (failure to advise defendant of mandatory minimum sentence could not have affected decision to plead guilty because record establishes defendant's belief that minimum sentence was greater than actual statutory minimum). A defendant also might be unable to prevail because, as a matter of law, counsel's performance could not be found deficient. *E.g.*, *United States* v. *Brooks*, 125 F.3d 484, 496 (7th Cir. 1997) (record on appeal establishes that performance was not unreasonable because counsel explained that decision not to recall witness was based on strategic assessment that potential damage from testimony outweighed possible benefits).

1350 (8th Cir. 1990); *United States* v. *Loughery*, 908 F.2d 1014 (D.C. Cir. 1990); *United States* v. *Iorizzo*, 786 F.2d 52, 57-59 (2d Cir. 1986); *Government of the Virgin Islands* v. *Zepp*, 748 F.2d 125 (3d Cir. 1984); cf. *United States* v. *Russell*, 221 F.3d 615, 619-623 (4th Cir. 2000) (granting relief on direct appeal on ineffective assistance claim based on record developed in post-trial proceedings on motion for new trial under Federal Rule of Criminal Procedure 33); *United States* v. *Patterson*, 215 F.3d 776 (7th Cir.) (same), judgment vacated in part on other grounds, 531 U.S. 1033 (2000); *United States* v. *Fulton*, 5 F.3d 605, 613-614 (2d Cir. 1993) (granting relief on direct appeal on grounds of ineffective assistance after district court rejected post-trial motion under Section 2255).

In either situation—whether relief is granted or denied—resolving the claim on direct appeal serves the interest of finality by averting the need for post-conviction proceedings to adjudicate the claim. See *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979) ("Every inroad on the concept of finality * * * by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice.") (quoting *United States* v. *Smith*, 440 F.2d 521, 528-529 (7th Cir. 1971)). Rules requiring the timely presentation of claims that are ripe for review serve those finality interests.

Procedural default principles advance the interest in finality not only by encouraging resolution of certain claims on direct appeal, but also by accelerating disposition of claims on collateral review. The rule requires dismissal of some ineffectiveness claims brought under Section 2255 in advance of a merits inquiry. If a claim raised on collateral review is "based solely on the record developed at trial," *Billy-Eko*, 8 F.3d at 115; see *McCleese*, 75 F.3d at 1178, denial of the claim at the outset of the proceedings because of a failure to establish "cause" pretermits adjudication of a legal challenge that otherwise could unsettle the final judgment. Moreover, the procedural default rule, by the fact of its existence, tends to dissuade the filing of ineffectiveness claims that are susceptible to dismissal because they are grounded solely in the trial record. Those effects on ineffectiveness claims both on direct appeal and on collateral review advance the finality interest in "minimizing the number of collateral proceedings so that the

direct appeal will be the main bout and not just the warm-up." *Guinan*, 6 F.3d at 472.[12]

For substantially similar reasons, procedural default principles promote efficiency in the administration of criminal proceedings by encouraging resolution of legal challenges at the earliest feasible opportunity. See *Guinan*, 6 F.3d at 472. In the case of a meritorious claim of ineffective assistance, for instance, the award of relief "on appeal, rather than on postconviction review," would afford "the opportunity to resolve the issue shortly after trial, while evidence is still available both to assess the * * * claim and to retry the defendant effectively if he prevails in his appeal." *Reed* v. *Ross* 468 U.S. 1, 10 (1984). In the case of a non-meritorious ineffective assistance claim, it may be more efficient to resolve the claim on direct appeal when the case may be before the court of appeals on other issues, rather than through the institution of a round of collateral review perhaps followed by another appeal.

Requiring assertion on direct appeal of certain ineffectiveness claims also "forc[es] the defendant to litigate all of his claims together" on appeal, "as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on the case."

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[12] Section 105 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1220, establishes a default rule that Section 2255 motions must be brought within one year of the date on which a conviction becomes final. See 28 U.S.C. 2255 para. 6(1). That provision does not affect the ordinary operation of the procedural bar against collateral review of claims not raised on direct appeal. Rather, the procedural default rule and AEDPA's default one-year limitations period work in complementary fashion to reduce delay in the assertion of legal challenges to a conviction and to advance the interest in respecting finality.

Ross, 468 U.S. at 10. If an ineffective assistance claim is closely connected with other claims raised on direct appeal, efficiency considerations weigh in favor of addressing all the related claims in one proceeding. The procedural default rule also streamlines the administration of claims at the collateral review stage by affording the district courts a basis for denying relief at the outset of Section 2255 proceedings based on the failure to establish "cause"—without the need to entertain the claim on the merits, and often, without the need to conduct an evidentiary hearing. For all of those reasons, the important objectives advanced by the procedural default rule in other contexts are served by enforcing the rule against ineffective assistance claims.

b. Petitioner's amicus, the National Association of Criminal Defense Lawyers (NACDL), contends that the values served by procedural default principles are not implicated when a defendant fails to raise an ineffectiveness claim *on appeal*, because, according to NACDL, procedural default principles exist only to ensure the making of contemporaneous objections *at trial*. NACDL Br. 11-13. That argument lacks merit. See *Carrier*, 477 U.S. at 490 (finding "unpersuasive" the contention "that the concerns that underlie the cause and prejudice test are not present in the case of defaults on appeal"). Even if it were the case, as NACDL erroneously presumes (Br. 12-13), that procedural default rules exist solely to discourage defense counsel from withholding an objection for tactical reasons, see, *e.g.*, *Wainwright* v. *Sykes*, 433 U.S. 72, 89 (1977), that concern arises on appeal as well as at trial: "the possibility of 'sandbagging'" does not "vanish[] once a trial has ended in conviction, since appellate counsel might well conclude that the best strategy is to select a few promising claims for airing on appeal, while reserving

others for federal habeas review should the appeal be unsuccessful." *Carrier*, 477 U.S. at 492; see *Ross*, 468 U.S. at 14 ("In general, therefore, defense counsel may not make a tactical decision to forgo a procedural opportunity—for instance, an opportunity to object at trial *or to raise an issue on appeal*.") (emphasis added).

In any event, the procedural default rule and the attendant cause-and-prejudice standard are grounded in broader societal interests in according respect to the finality of criminal proceedings and encouraging the prompt resolution of legal challenges to criminal judgments. Those important values, for the reasons explained, are advanced by applying the procedural default rule to claims asserting ineffective assistance of counsel.

4. The procedural default rule is not unworkable, unfair, or unduly burdensome when applied to ineffective assistance claims

The lynchpin of petitioner's argument for a categorical exception to the procedural default rule is that, in the particular context of ineffective assistance claims, enforcement of the procedural default rule and the "cause and prejudice" standard entails an excessive burden on judicial administration and works unfairness against defendants. Pet. Br. 25-29. The procedural default rule, however, is not unworkable or unfair when applied to ineffective assistance claims.

a. Petitioner, joined by NACDL, argues that applying procedural default principles to ineffective assistance claims imposes an unwarranted burden on defendants and the courts. Petitioner and NACDL argue (Pet. Br. 17; NACDL Br. 23), for instance, that the imperative to avoid a procedural default imposes excessive burdens on newly appointed appellate counsel to

scour the trial record in search of ineffective assistance claims. Any such obligation, however, does not seem appreciably out of step with counsel's basic responsibility in all cases to examine the trial record in order to identify potential legal claims to raise on appeal. Moreover, because the prospect of procedural default arises only if an ineffectiveness claim brought on collateral review is based solely on the record that was available on appeal, *Billy-Eko*, 8 F.3d at 115; *McCleese*, 75 F.3d at 1178, counsel need only identify those ineffectiveness claims that are fully apparent and developed in the record.

Petitioner and NACDL also assert (Pet. Br. 22; NACDL Br. 22) that the procedural default rule burdens the courts of appeals by saddling them with ineffective assistance claims raised prematurely on direct appeal. But no court of appeals prohibits assertion of an ineffectiveness claim on direct appeal. Accordingly, all circuits—not just those that apply the procedural default rule—must deal with ineffectiveness claims raised on direct appeal and determine whether to resolve the claims or remit them to collateral review.[13] The government's experience in the Second and Seventh Circuits does not support the suggestion (Pet. Br. 22; NACDL Br. 22) that, in those courts that apply the procedural default rule to ineffective assistance claims, defendants will inundate the courts with ineffectiveness claims to protect against the possibility

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[13] See, *e.g.*, *United States* v. *Haywood*, 155 F.3d 674, 678 (3d Cir. 1998); *United States* v. *King*, 119 F.3d 290, 295 (4th Cir. 1997); *United States* v. *Rivas*, 157 F.3d 364, 369 (5th Cir. 1998); *United States* v. *Neuhausser*, 241 F.3d 460, 474-475 (6th Cir.), cert. denied, 122 S. Ct. 181 (2001); *United States* v. *Richardson*, 167 F.3d 621, 626 (D.C. Cir.), cert. denied, 528 U.S. 895 (1999).

of a default. Only those ineffectiveness claims that are fully developed in the trial record are subject to the procedural bar; and to the extent that the effect is to cause defendants to raise fully developed claims on direct appeal, that is the object of the rule.

Even when defendants raise claims on appeal that are not ripe for resolution and require further factual development, the assertion of the claim on appeal does not compel its resolution by the court of appeals. Instead, courts of appeals have flexibility to direct consideration of the claim in the most appropriate and efficient manner—by addressing the claim on the merits or by remitting the defendant to collateral review under Section 2255 for initial consideration of the claim with other post-conviction claims.[14] That framework is not at odds with the normal appellate function (Pet. Br. 16; NACDL Br. 16-17), because it contemplates resolution on appeal only of claims for which the trial record is adequately developed.

Finally, petitioner suggests (Br. 28-29) that district courts will be burdened by having to apply the cause-and-prejudice standard when an ineffectiveness claim is

[14] Some decisions appear to suggest a blanket preference for remanding an ineffectiveness claim that requires further factual development rather than remitting the defendant to pursuing the claim on collateral review. See *United States* v. *Geraldo*, 271 F.3d 1112, 1116 (D.C. Cir. 2001); *United States* v. *Leone*, 215 F.3d 253, 256 (2d Cir. 2000). Generally, however, the proper course is to decline to resolve the claim and grant the defendant leave to develop it on collateral review. See *United States* v. *Reyes-Platero*, 224 F.3d 1112, 1116-1117 (9th Cir. 2000) (inappropriate to remand claim), cert. denied, 531 U.S. 1117 (2001); *Haywood*, 155 F.3d at 678 & n.3 (same). A routine resort to remand would delay imposition of a final judgment and would have the effect of undermining AEDPA's strict limitations on the filing of successive Section 2255 motions. See 28 U.S.C. 2255 para. 8.

raised on collateral review. It is not clear, however, why applying the cause-and-prejudice standard exacts more of a toll on district courts in the context of ineffective assistance claims than in the context of all other claims. In fact, because, with ineffective assistance claims, the analysis of prejudice merges with the prejudice prong of the underlying claim on the merits, see pp. 21-22, *supra*, any added burden on district courts in that context flows solely from the "cause" requirement. And even on the question of "cause," there would be no need for extensive examination of the issue when it is apparent that cause exists for having failed to raise an ineffectiveness claim on direct appeal—either because trial counsel represented the defendant on appeal or because the claim is based on extrinsic evidence outside the trial record.[15]

b. Petitioner and NACDL also contend that the procedural default rule is unpredictable when applied to ineffectiveness claims and thus results in unfairness to defendants. According to petitioner and NACDL (Pet. Br. 16, 25; NACDL Br. 20-21), the circumstances in which an ineffectiveness claim is required to be raised on direct appeal are not clear. As a result, they assert

[15] NACDL argues (Br. 18-19) that ineffectiveness claims should be addressed on collateral review in order to ensure that trial counsel has a full opportunity to explain his or her challenged actions. The government shares an interest in ensuring that relief is not granted on grounds of ineffective assistance without taking into account trial counsel's strategic reasons for a challenged decision. The Seventh Circuit has addressed those concerns by adopting a presumption on direct appeal that trial counsel acted for tactical reasons. See, *e.g.*, *United States* v. *Trevino*, 60 F.3d 333, 338 (7th Cir. 1995), cert. denied, 516 U.S. 1061 (1996). Relief therefore is available on direct appeal only if there is no possible strategic explanation for counsel's actions.

(Pet. Br. 27; see NACDL Br. 20-21), a defendant represented by new counsel, when deciding whether to raise an ineffective assistance claim on appeal, is put to the unfair choice between, on one hand, presenting the claim and risking its resolution against him based on an inadequate factual record, and, on the other hand, forgoing assertion of the claim and risking procedural default when the claim is raised on collateral review. The dilemma outlined by petitioner and NACDL, however, should not often arise in practice.

First, contrary to the premise of their argument, the standard for determining when a claim is sufficiently developed on the trial record to require its assertion on direct appeal is not unduly ambiguous or unworkable. The Second Circuit and the Seventh Circuit apply essentially the same test: there is no "cause" for having failed to raise the claim on direct appeal if the claim, when presented on collateral review, "is based solely on the record developed at trial." *Billy-Eko*, 8 F.3d at 115; *McCleese*, 75 F.3d at 1178 (absence of cause if "no extrinsic evidence" offered in support of claim). That standard is straightforward for district courts to apply in Section 2255 proceedings: the question is whether the claim relies on new evidence outside the record that was available on appeal. If it does not—if the claim is grounded solely on the record that was available on appeal—then the same claim based on the same facts could have been raised on direct appeal, and there is no "cause" for having failed to assert it at that time (at least if the defendant was represented by new counsel on appeal).[16]

[16] The application of that standard requires that the purportedly new non-record evidence make a substantive addition to the trial record. It is not enough for a defendant to proffer evidence that purports to add a new basis for a claim of ineffective assistance, but that, in fact, substantively is equivalent to matter already in the trial record. Otherwise, defendants could easily circumvent the procedural default rule by tendering affidavits that purport to offer new evidence even when they add nothing to the claim. Such an approach—as occurred in this case—should not be permitted. See pp. 37-44, *infra*.

At the time of the direct appeal, moreover, the standard applied by the Second and Seventh Circuits confronts a defendant deciding whether to raise an ineffectiveness claim with a fairly straightforward question: whether the claim is likely to be based on extrinsic evidence if it is later brought on collateral review. If the claim requires development of extra-record evidence for its resolution, it can safely be held over for proceedings under Section 2255. That will often be the case. For instance, a claim based on an alleged conflict of interest frequently turns on extrinsic facts concerning counsel's relationships with third parties or extra-record communications with the client. See, *e.g.*, *Amiel*, 209 F.3d at 198; *United States* v. *Stoia*, 22 F.3d 766, 768 (7th Cir. 1994); but see *United States* v. *Stantini*, 85 F.3d 9, 20 (2d Cir.) (rejecting claim based on asserted conflict of interest because clear from trial record that conflict could not have affected defense), cert. denied, 519 U.S. 1000 (1996). A claim based on counsel's lack of preparation also often requires development of extrinsic evidence, including counsel's testimony concerning preparation of the defense. See, *e.g.*, *Abbamonte* v. *United States*, 160 F.3d 922, 925 (2d Cir. 1998); *Billy-Eko*, 8 F.3d at 116. Likewise, allegations based on counsel's failure to take certain actions—*e.g.*, to call a particular witness, or to investigate a particular issue —sometimes require development of evidence on counsel's reasons for the decision or on the nature of

the testimony or evidence at issue. See, *e.g.*, *Ellerby* v. *United States*, 187 F.3d 257, 259-260 (2d Cir. 1998) (per curiam); *United States* v. *Downs*, 123 F.3d 637, 641-642 (7th Cir 1997); *United States* v. *Workman*, 80 F.3d 688, 700-701 (2d Cir.), cert. denied, 519 U.S. 938 and 955 (1996); but see *Finley*, 245 F.3d at 204 (prejudice could not be proved as a matter of law); *United States* v. *Ben Zvi*, 242 F.3d 89, 96-98 (2d Cir. 2001) (same); *McCleese*, 75 F.3d at 1178-1179 (same).

In contrast, if the factual basis for the claim of ineffective assistance is developed in the record on appeal and the defendant has concerns about whether the claim will be based on additional extra-record evidence if it were raised on collateral review, he can protect against the possibility of procedural default by asserting the claim on appeal. The Second Circuit, to that effect, has urged "new appellate counsel * * * to err on the side of inclusion on direct appeal." *Billy-Eko*, 8 F.3d at 116; see *ibid.* (suggesting that counsel should "[i]nclud[e] the claim, complete with the attorney's assertion that further factual development is necessary"). In that situation, the court could decide the claim if the record conclusively established either an entitlement to relief or that the claim cannot prevail. See pp. 23-24, *supra*. If the court is unable to resolve the claim definitively in either direction, it should decline to address it and permit development of the record on collateral review. See, *e.g.*, *United States* v. *Williams*, 205 F.3d 23, 35-36 (2d Cir.), cert. denied, 513 U.S. 885 (2000); *Workman*, 80 F.3d at 700-701. Neither outcome would prejudice the defendant: resolution of the claim by the court of appeals, by assumption, would give the defendant the same relief he would have obtained had the claim been pressed on collateral review; and the court's declining to address the claim

would leave the defendant free to pursue the claim under Section 2255. For those reasons, insofar as there is some ambiguity concerning when a claim is sufficiently developed in the record to require its assertion on appeal, the rule nonetheless should not work unfairness against a defendant in practice.[17]

c. Finally, the experience of state courts suggests that application of the procedural default rule to ineffective assistance claims is not unworkable and does not entail an unwarranted burden on judicial administration. The procedural rules applied in the States serve the same objectives as their federal counterparts. See *Ross*, 468 U.S. at 10. ("The criminal justice system in each of the 50 States is structured both to determine the guilt or innocence of defendants and to resolve all questions incident to that determination, including the constitutionality of the procedures leading up to the verdict. Each State's complement of procedural rules facilitates this complex process, channeling, to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently.").

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[17] NACDL identifies a handful of district court decisions (NACDL Br. 21) that, in NACDL's view, unfairly hold that the defendant procedurally defaulted an ineffectiveness claim. In each case, however, the court went on to address the claim on the merits. See *Moskowitz* v. *United States*, No. 01-Civ-10644, 2002 WL 31119629, at *3-*4 (S.D.N.Y. Sept. 24, 2002); *Saldarriaga* v. *United States*, No. 99-CIV-4487, 2002 WL 449651, at *3-*4 (S.D.N.Y. Mar. 21, 2002); *Peets* v. *United States*, 55 F. Supp. 2d 275, 277-279 (S.D.N.Y. 1999); *Grice* v. *United States*, No. 98-CV-622, 1998 WL 743718, at *2-*3 (N.D.N.Y. Oct. 15, 1998); cf. *James* v. *United States*, No. 00-CIV-8818LAKGWG, 2002 WL 1023146, at *9-*10, *14-*16 (S.D.N.Y. May 20, 2002) (claims asserting ineffectiveness of trial counsel not sufficiently meritorious to render appellate counsel ineffective for failing to raise claims on appeal).

It therefore is significant that a substantial number of States apply the procedural default rule to ineffective assistance of counsel claims. The governing rule in 20 States is that, when a claim of ineffective assistance is sufficiently developed in the trial record, the failure to raise the claim on direct appeal bars its consideration in a post-conviction proceeding, at least if the defendant was represented by new counsel on appeal.[18]

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[18] That result is reflected in the decisions of the highest courts in 16 states, see *Sullivan* v. *United* States, 721 A.2d 936, 937 (D.C. 1998); *White* v. *Kelso*, 401 S.E.2d 733, 734 (Ga. 1991); *State* v. *Silva*, 864 P.2d 583, 591-592 (Haw. 1993) (assuming procedural bar); *People* v. *Coady*, 622 N.E.2d 798, 802 (Ill. 1993); *Jones* v. *State*, 479 N.W.2d 265, 271 (Iowa 1991); *Commonwealth* v. *Chase*, 741 N.E.2d 59, 64 & n.3 (Mass. 2001); *Robledo-Kinney* v. *State*, 637 N.W.2d 581, 585 (Minn. 2002); *Lockett* v. *State*, 656 So. 2d 76, 80 (Miss.), cert. denied, 515 U.S. 1150 (1995); *State* v. *Courchene*, 847 P.2d 271, 276 (Mont. 1992); *State* v. *Williams*, 609 N.W.2d 313, 317-318 (Neb. 2000); *State* v. *Fair*, 557 S.E.2d 500, 524-525 (N.C. 2001), cert. denied, 122 S. Ct. 2332 (2002); *State* v. *Lentz*, 639 N.E.2d 784, 785 (Ohio 1994); *McCracken* v. *State*, 946 P.2d 672, 676 (Okla. Crim. App. 1997); *Commonwealth* v. *Moore*, 805 A.2d 1212, 1214-1216 (Pa. 2002); *Pascual* v. *Carver*, 876 P.2d 364, 366 (Utah 1994); *State* v. *Escalona-Naranjo*, 517 N.W.2d 157, 158-159, 163-164 (Wis. 1994); *Amin* v. *State*, 774 P.2d 597, 598-599 (Wyo. 1989), and in the decisions of intermediate courts in four states, see *Cain* v. *State*, 712 So. 2d 1110, 1112 (Ala. Crim. App. 1997); *Maggard* v. *State*, 11 P.3d 89, 93 (Kan. Ct. App. 2000); *People* v. *Wong*, 682 N.Y.S.2d 689, 691 (N.Y. App. Div. 1998); *McCarver* v. *Lee*, 221 F.3d 583, 589 (4th Cir. 2000) (reviewing North Carolina decisions). See generally Anne M. Voigts, Note, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 Colum. L. Rev. 1103, 1128 (1999) ("in a growing number of cases, state courts are finding procedural defaults based on failure to raise ineffective assistance of counsel claims on direct appeal").

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The bright-line exception to the procedural default rule for ineffectiveness claims urged by petitioner would be easy to administer and would avoid any burdens and uncertainties associated with applying the "cause and prejudice" standard in particular cases. But the interest in ease of administration alone does not justify avoiding the procedural default rule, because the important societal interests in respecting the finality of criminal judgments compels adherence to the rule's restrictions on collateral review. Application of the procedural default rule to ineffective assistance claims advances those interests, and enforcement of the rule in that context is not unworkable or unfair.

II. THE COURT OF APPEALS CORRECTLY DENIED PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM UNDER THE PROCEDURAL DEFAULT RULE

A. The Court Of Appeals Correctly Concluded That Petitioner's Ineffective Assistance Claim Is Grounded Solely In The Record Developed At Trial

Petitioner's claim of ineffective assistance alleges that his trial counsel was ineffective in failing to seek or accept a continuance after learning that a bullet had been found in the car in which Fiorito's body was discovered. The court of appeals correctly concluded that petitioner's ineffectiveness claim is "based solely on the record adduced at trial and available to [petitioner's] appellate counsel on direct appeal," Pet. App. A7, that "the record available to [petitioner's] appellate counsel on direct appeal fully revealed the implications of the failure to accept a continuance," *id.* at A8, and that petitioner therefore could not establish "cause" for

failing to raise his ineffective assistance claim on direct appeal, *ibid.*[19]

1. By the time petitioner's trial counsel received notice of the bullet's discovery, the parties had given their opening statements and the government had completed its direct examination of Esposito. The government had made no reference to the bullet, and petitioner's trial counsel had not cross-examined Esposito about the murder. Pet. App. A34, A36. Petitioner's counsel was aware before trial that Esposito would testify that petitioner had shot Fiorito a second time in the car; moreover, Esposito had already given that testimony when petitioner's counsel learned about the bullet. Petitioner's counsel also knew that a shell casing had been found in the car when Fiorito's body was discovered there, substantiating Esposito's testimony that Fiorito had been shot a second time in the car.

The discovery of the bullet, for those reasons, did not alter the government's theory of how the murder occurred and did not affect the defense's understanding of the government's theory. Moreover, the bullet did not physically link petitioner to the car or the murder. Instead, the discovery of the bullet in the car—like the earlier discovery of the shell casing in the car—corroborated Esposito's testimony that Fiorito had been shot a second time in the car. Esposito's

[19] Petitioner's claim that trial counsel was ineffective in failing to seek a continuance upon learning about the bullet, by its own terms, can only relate to counsel's conduct *after* he was apprised of the bullet's discovery. As a result, any events that preceded counsel's awareness of the bullet could have no bearing on petitioner's ineffectiveness claim. In any event, the court of appeals, in petitioner's direct appeal, held that the government's delay of four days in informing petitioner's trial counsel about the bullet, although "regrettable," did not prejudice petitioner. Pet. App. A36.

testimony was further confirmed by the determination that the bullet was of the same caliber as the shell casing, Trial Tr. 908, 3757-3758, and by ballistics tests finding that the bullet matched shell fragments discovered in Fiorito's head, J.A. 178-179.

2. By the time of petitioner's direct appeal, the Second Circuit had made clear that a defendant must raise an ineffective assistance claim on appeal if he is represented by new appellate counsel and the claim is fully developed in the trial record. *Billy-Eko*, 8 F.3d at 115. Because petitioner was represented by new counsel on appeal, and because he did not raise an ineffective assistance claim at that time, petitioner's ability to establish "cause" for not asserting the claim on appeal turns on whether his claim is "based solely on the record developed at trial." *Ibid.*; *McCleese*, 75 F.3d at 1178. Petitioner's ineffectiveness claim therefore must be based, at least in part, on extrinsic evidence not developed in the trial record. Petitioner, as the court of appeals correctly found, cannot make that showing.

a. Petitioner does not dispute that the trial record was fully developed on the performance prong of his ineffective assistance claim. Pet. Br. 32. The record contains numerous discussions about the district court's offer of a continuance and trial counsel's reasons for not accepting one. On September 28, 1993, for example, when petitioner first moved for a mistrial and the district court instead offered a continuance, counsel explained that a continuance was unnecessary because the defense had already retained a ballistics expert who could complete testing on the bullet in a short time. J.A. 20, 24-25. Counsel also argued that a continuance could not undo the effect of the bullet's discovery on the defense theory that no shot had been fired in the car. J.A. 24-25. Later in the trial, counsel reiterated on

several occasions his belief that a continuance would not have helped the defense, which was committed to attacking Esposito's testimony that petitioner had shot Fiorito once in the car. J.A. 55-57, 80-85, 100-101. Counsel also acknowledged that he perhaps should have accepted a continuance, observing that he would "take the weight for that," and that he "may have made a mistake. I made a mistake." J.A. 56, 57.

b. Although essentially acknowledging that the performance prong of his ineffectiveness claim rests solely on the trial record, petitioner argues that, as to the prejudice prong, his claim is based on new evidence that was not developed in the trial record. Pet. Br. 32. To establish that he was prejudiced by counsel's failure to accept a continuance, petitioner would need to prove that, if counsel had accepted a continuance, there is a "reasonable probability" that "the result of the [trial] would have been different." *Strickland*, 466 U.S. at 694. According to petitioner, the prejudice that allegedly resulted from trial counsel's failure to accept a continuance was not apparent until he retained three experts on collateral review, who, after reviewing the trial transcripts and some of the evidence, submitted affidavits attempting to cast doubt on whether the shooting in the car had occurred as Esposito described and whether the bullet recovered from the car in fact was related to Fiorito's murder. The three affidavits, however, add nothing of significance to the trial record on whether counsel's failure to accept a continuance caused prejudice to petitioner.

First, nothing in the affidavits suggests that a continuance would have enabled petitioner to challenge the evidence at trial that the bullet is the same caliber as the shell casing found in the car. More significantly, none of the experts contests the conclusion of the ballis-

tics tests introduced at trial that the bullet matches shell fragments recovered from Fiorito's head. In fact, none of the three experts conducted tests on the bullet or compared the bullet with the shell fragments in Fiorito's head, and only one purports to have physically examined the bullet. J.A. 166.[20] At trial, by contrast, petitioner—without the need for a continuance—retained an expert who conducted ballistics testing on the bullet and who quickly concluded, in agreement with the government's experts, that the bullet matched the shell fragments in Fiorito's head. Pet. App. A7. There is no suggestion in the expert affidavits of a reason to doubt the scientific match, and no indication that a continuance somehow could have enabled a direct challenge to that undisputed evidence. In fact, the affidavits offer no new evidence (or theory) on how a bullet that matches shell fragments found in Fiorito's head could have wound up in the car other than in the manner Esposito described.

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[20] Petitioner asserts without elaboration (Br. 12) that "the Government permitted only a restricted examination" of the physical evidence, repeating a suggestion made in the proceedings below that petitioner's experts were not allowed to conduct testing on the evidence. See J.A. 188-189. In fact, however, when petitioner's new counsel on collateral review initially sought to have trial evidence examined, the government expressed its concern that the integrity of the evidence be maintained. To that end, counsel was asked to specify the types of testing the experts desired to conduct and the effects of those tests on the evidence, or to seek a court order permitting the tests to be conducted. That recommendation was repeated in a letter to the district court and to counsel. Petitioner thereafter did not pursue further examination of the evidence or seek a court order. See Gov't Mem. of Law in Opp. to Joseph Massaro's Mot. for a New Trial and for Relief Under 28 U.S.C. 2255 at 45 n.29.

The affidavits raise questions about whether Esposito's account of the shot fired in the car can be squared with the physical evidence. The first affidavit was submitted by a forensic scientist, Robert Kopec, who reviewed various reports and photographs and portions of the trial transcript. J.A. 143. He observed that there was no blood from petitioner's or Esposito's clothing in the front seat of the car when Fiorito's body was found, J.A. 145, that no blood or tissue "spatter" from the bullet wounds was discovered in the car, J.A. 146-147, that the failure of previous searches to uncover the bullet in the car raised suspicions about the bullet's late discovery, J.A. 147-148, that the bullet should have been extremely deformed rather than only moderately deformed if it had passed through Fiorito's head and the carpeting and insulation of the car, J.A. 148-149, and that Esposito's description of the position of Fiorito's body when he was shot could not be squared with the angle of the wound and the location of the bullet, J.A. 149-150. He opined for those reasons that Esposito's testimony was "not consistent with the physical evidence." J.A. 151.

The remaining two affidavits make some of the same observations. The second expert is Rene Trasorras, a criminal investigator, whose opinion was based on a review of the "facts" of the case. J.A. 161. He concluded that the shooting could not have occurred as Esposito described because the delayed discovery of the bullet cast doubt on its evidentiary value and because the shooting should have produced blood or tissue "splatter" in the car. J.A. 162. Finally, Charles V. Morton, a criminologist, conducted what he described as a "cursory examination" of several items of evidence. J.A. 166. After cataloging the evidence and documents he reviewed, J.A. 165-174, he reached the

"tentative conclusion[]" that there are "serious questions" about the evidence, J.A. 174. He viewed the failure to find the bullet in initial searches of the car to cast doubt on the bullet's evidentiary value, and he believed that proper examinations were not conducted on the hole in the carpet of the car. J.A. 174-175.

Those affidavits, according to petitioner (Br. 18, 32), constitute extrinsic evidence not in the trial record that advance the claim that counsel's failure to seek a continuance was prejudicial. The thrust of petitioner's argument (Br. 18) is that, if trial counsel had secured a continuance, he could have devised the same arguments as are now in the affidavits to cast doubt on Esposito's testimony, and to argue that the bullet—notwithstanding the ballistics match—was unrelated to the murder. If the affidavits in fact presented new theories for calling the bullet evidence into question, petitioner might be able to establish that his claim of prejudice is based on evidence outside the trial record. That argument, however, does not succeed in this case. That is because, as the court of appeals explained, "each of the issues raised" in the three affidavits—"the absence of blood in the vehicle, the absence of blood 'spatter' or other remnants, the belated discovery of the bullet after several searches—all were extensively addressed at trial." Pet. App. A7-A8.

For instance, petitioner's trial counsel cross-examined the crime scene detective and medical examiner about the absence of blood and "spatter" in the car. Trial Tr. 922, 939, 1580, 1621, 1627-1628. He also presented a videotaped demonstration in an effort to cast doubt on Esposito's account of the position of Fiorito's body, and argued in his summation that the shot could not have been fired in the manner Esposito testified given the positioning of the body in the car. *Id.* at 1589-

1595, 4905-4948, 5309-5319. In addition, counsel questioned several witnesses about the circumstances surrounding the bullet's discovery and the failure to discover it earlier. *Id.* at 3711-3721, 4161-4163, 4171-4179, 4186-4194, 4217-4222, 4467-4471. Finally, counsel asserted in his summation that the condition of the bullet was not consistent with its allegedly having traveled through Fiorito's head and the carpet of the car into the floor. *Id.* at 5317.

The upshot is that the affidavits do not offer new evidence on how, if counsel had obtained a continuance, the result of the trial would have been different. The affidavits do not reveal a new theory that was unknown to counsel and that would have contributed to the argument that failure to seek a continuance was prejudicial. Nor do the affidavits explain how a continuance would have enabled trial counsel to develop more effectively the theories that he knew about and argued to the jury. Instead, the affidavits reiterate theories that were explored and argued at trial, and that presumably were rejected by the jury. It follows that petitioner's claim of ineffective assistance does not rest on extrinsic evidence concerning the prejudice caused by counsel's failure to secure a continuance. Instead, petitioner's claim is based "solely on the record developed at trial," *Billy-Eko*, 8 F.3d at 115, and he therefore cannot establish "cause" for failing to assert the claim on direct appeal.[21]

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[21] Petitioner suggests (Br. 33) that the government's delay in disclosing discovery of the bullet suffices to establish "cause." That is incorrect. The government's belated disclosure of the bullet *at trial* cannot constitute "cause" for petitioner's failure to raise a claim of ineffective assistance *on appeal*. Moreover, the court of appeals specifically found that petitioner had not been prejudiced by the delay. Pet. App. A36.

B. This Court Should Affirm The Judgment On The Alternate Ground That, Even If Petitioner Can Establish "Cause," He Cannot Establish "Prejudice"

Even assuming that petitioner can establish "cause" on the basis that his claim is now based on new evidence that was not developed in the trial record, this Court should affirm the judgment on the ground that petitioner cannot demonstrate "prejudice." The question presented (Pet. i) concerns whether a defendant is procedurally barred from raising his ineffective assistance claim under Section 2255 in the circumstances of this case, and it is settled that, to avoid a procedural bar, a defendant must establish both "cause" and "prejudice." *E.g.*, *Bousley*, 523 U.S. at 622; *Carrier*, 477 U.S. at 485. Accordingly, petitioner argues (Br. 33) that he has demonstrated both cause and prejudice for failing to raise his claim on appeal. As a matter of law, however, petitioner cannot establish prejudice in this case.

Demonstrating "prejudice" for purposes of the cause-and-prejudice standard, as explained, entails establishing "prejudice" on the underlying claim of ineffective assistance. See pp. 21-22, *supra*. Petitioner thus must show that, if trial counsel had accepted a continuance, there is a reasonable probability that the result at trial would have been different. Even assuming that a continuance would have assisted petitioner in developing further the theories reviewed in the expert affidavits, there is no reasonable likelihood that the jury would have acquitted petitioner on the charge that he murdered Fiorito.

First, none of the theories advanced in the affidavits calls into question Esposito's testimony about the first shot petitioner fired into Fiorito's head in the vacant house. As to the second shot fired in the car, a shell

casing was found in the car at the time Fiorito's body was discovered, a bullet was later found in the car, the shell casing and the bullet are of the same caliber, and, most importantly, ballistics tests conducted both by the government and by petitioner's expert confirmed that the bullet matches shell fragments found in Fiorito's head. The theories outlined in the expert affidavits contain no explanation for the discovery in the car of a bullet scientifically matched to shell fragments in Fiorito's head. And the attacks on whether Esposito's account conforms to the physical evidence were already placed before the jury. The jury nonetheless was persuaded by Esposito's testimony, and it rejected petitioner's attempt to argue that Esposito alone was responsible for the murder. In those circumstances, there can be no reasonable likelihood that a continuance to further develop arguments along the lines contemplated in the affidavits could have affected the jury's verdict against petitioner.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
MICHAEL CHERTOFF
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
SRI SRINIVASAN
Assistant to the Solicitor General
STEVEN L. LANE
Attorney

DECEMBER 2002

APPENDIX

1. The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

2. Section 2255 of Title 28, United States Code (2000) provides in relevant part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to

collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

* * * * *

Supreme Court U.S.
FILED
JAN 22 2003
CLERK

No. 01-1559

In the
Supreme Court of the United States

JOSEPH MASSARO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

HERALD PRICE FAHRINGER*
ERICA T. DUBNO
LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY
& CAMBRIA LLP
780 Third Avenue, 32nd Floor
New York, NY 10017
(212) 319-5351

Counsel for Petitioner

* *Counsel of Record*

Of Counsel:
EUGENE GRESSMAN
Univ. of North Carolina
School of Law
Campus Box #3380
Chapel Hill, NC 27599
(919) 962-3688

JANUARY 22, 2003

25 pp

TABLE OF CONTENTS

Page

ARGUMENT

I. A FEDERAL CRIMINAL DEFENDANT, WHOSE NEW APPELLATE COUNSEL FAILS TO RAISE A CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ON DIRECT APPEAL, SHOULD NOT BE PROCEDURALLY BARRED FROM ASSERTING THAT CONSTITUTIONAL CLAIM IN A HABEAS CORPUS PROCEEDING BROUGHT PURSUANT TO 28 U.S.C. § 2255 1

A. The Procedural Default Rule Should Not Be Applied to Claims Asserting the Ineffective Assistance of Trial Counsel 1

B. The Considerable Experience of Most State Courts and Federal Circuit Courts Argues Against the Second Circuit's Procedural Default Rule 4

C. Defendants Will Be Prejudiced If Appellate Attorneys Are Compelled to Raise Ineffectiveness Claims on Direct Appeal 7

D. Finality of Judgment Should Not Dictate a Default Rule Which Has Serious Practical Drawbacks and Undermines Sixth Amendment Values 9

II. THE COURT OF APPEALS ERRONEOUSLY DENIED PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM 14

A. Cause Exists for Any Failure to Present Petitioner's Ineffectiveness Claim on Direct Appeal 14

B. Prejudice Results From Any Failure to Present the Ineffectiveness Claim on Direct Appeal 16

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

Federal Cases:

Billy-Eko v. United States,
509 U.S. 901 (1993) 2

Billy-Eko v. United States,
8 F.3d 111 (2d Cir. 1993) 8

Bousley v. United States,
523 U.S. 614 (1998) 10

Chappell v. United States,
494 U.S. 1075 (1990) 2, 8

Diaz-Albertini v. United States,
498 U.S. 1061 (1991) 2, 8

Duncan v. Walker,
533 U.S. 167 (2001) 12

Guinan v. United States,
6 F.3d 468 (7th Cir. 1993) 8, 13

Kimmelman v. Morrison,
477 U.S. 365 (1986) 3

Moghal v. United States,
519 U.S. 835 (1996) 8

Murray v. Carrier,
477 U.S. 478 (1986) 12

Riascos-Prado v. United States,
66 F.3d 30 (2d Cir. 1995) 11

Sprecher v. United States,
516 U.S. 913 (1995) 8

Strickland v. Washington,
466 U.S. 668 (1984) 16

Sunal v. Large,
332 U.S. 174 (1947) 12

United States v. Cronic,
466 U.S. 648 (1984) 2

United States v. Frady,
456 U.S. 152 (1982) 12, 16

United States v. Galloway,
56 F.3d 1239 (10th Cir. 1995) ..... *passim*

United States v. Mala,
7 F.3d 1058 (1st Cir. 1993), *cert. denied*,
511 U.S. 1086 (1994) 2

United States v. Timmreck,
441 U.S. 780 (1979) 10

United States v. Trevino,
60 F.3d 333 (7th Cir. 1995), *cert. denied*,
516 U.S. 1061 (1996) 3, 9

United States v. Woolley,
123 F.3d 627 (7th Cir. 1997) 4, 11, 12

Velasquez v. United States,
516 U.S. 1160 (1996) 8

State Cases:

Champion v. State,
908 P.2d 454 (Alaska Ct. App. 1995) 6

Commonwealth v. Grant,
No. 57 WAP 2001, 2002 WL 31898393
(Pa. Dec. 31, 2002) ..... *passim*

Feazell v. State,
906 P.2d 727 (Nev. 1995) 2

Gibbons v. State,
634 P.2d 1214 (Nev. 1981) 2

Humphrey v. Cunningham,
584 A.2d 763 (N.H. 1990) 6

Hunt v. State,
583 A.2d 218 (Md. 1990), *cert. denied*,
502 U.S. 835 (1991) 6

Jackson v. State,
654 A.2d 829 (Del. 1995) 6

Lawrence v. State,
691 So. 2d 1068 (Fla. 1997), *cert. denied*,
522 U.S. 880 (1997) 6

People v. Alvarado,
683 N.Y.S.2d 501 (N.Y. App. Div.
1st Dept. 1998) 3

People v. Brown,
382 N.E.2d 1149 (N.Y. 1978) 6

People v. Mendoza Tello,
933 P.2d 1134 (Cal. 1997) 3, 5

Roach v. Commonwealth,
468 S.E.2d 98 (Va. 1996), *cert. denied*,
519 U.S. 951 (1996) 6

Robinson v. State,
16 S.W.3d 808 (Tex. Crim. App. 2000) 5

State v. Bengson,
541 N.W.2d 702 (N.D. 1996) 6

State v. Elison,
21 P.3d 483 (Idaho 2001) 5

State v. Fraser,
608 N.W.2d 244 (N.D. 2000) 5

State v. Hernandez,
686 So. 2d 92 (La. Ct. App. 1996) 6

State v. Hurt,
931 S.W.2d 213 (Mo. Ct. App. 1996) 6

State v. Kornahrens,
350 S.E.2d 180 (S.C. 1986), *cert. denied*,
480 U.S. 940 (1987) 6

State v. Malstrom,
672 A.2d 448 (R.I. 1996) 6

State v. McGill,
536 N.W.2d 89 (S.D. 1995) 6

State v. Nichols,
698 A.2d 521 (Me. 1997) 6

State v. Pettypool,
676 P.2d 368 (Or. 1984) 6

State v. Pugsley,
911 P.2d 761 (Idaho 1995) 6

State v. Sparano,
592 A.2d 608 (N.J. Super. Ct. App. Div. 1991) 6

State v. Spreitz,
39 P.3d 525 (Ariz. 2002) 5, 6

Ware v. State,
759 A.2d 764 (Md. 2000), *cert. denied*,
531 U.S. 1115 (2001) 5

Woods v. State,
701 N.E.2d 1208 (Ind. 1998), *cert. denied*,
528 U.S. 861 (1999) 6

Miscellaneous:

Caroline Wolf Harlow, *Bureau of Justice Statistics Special Report: Defense Counsel in Criminal Cases*, (Nov. 2000) 8

Bureau of Justice Statistics Sourcebook of Criminal Justice Statistics, U.S. Department of Justice 5

Federal Habeas Corpus Review: Challenging State Court Criminal Convictions, U.S. Department of Justice, Office of Justice Programs (Sept. 1995) 5

Anne M. Voigts, Note, *Narrowing the Eye of the Needle: Procedural Defaults, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 Colum. L. Rev. 1103 (1999) 5

ARGUMENT

I. A FEDERAL CRIMINAL DEFENDANT, WHOSE NEW APPELLATE COUNSEL FAILS TO RAISE A CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ON DIRECT APPEAL, SHOULD NOT BE PROCEDURALLY BARRED FROM ASSERTING THAT CONSTITUTIONAL CLAIM IN A HABEAS CORPUS PROCEEDING BROUGHT PURSUANT TO 28 U.S.C. § 2255

A. The Procedural Default Rule Should Not Be Applied to Claims Asserting the Ineffective Assistance of Trial Counsel

The Solicitor General now argues for the adoption of the Second Circuit's severe rule which imposes a procedural bar against the presentation of Sixth Amendment claims in a § 2255 proceeding where the defendant was represented by new counsel on appeal and the claim was fully developed on the record, unless the defendant can establish cause and actual prejudice for the failure of appellate counsel to raise the ineffectiveness issue on direct appeal.

However, in an unbroken line of cases, stretching over a long history of our federal and state courts, it has been recognized that ineffective assistance claims are more properly brought in a collateral proceeding, rather than on direct appeal (United States Br. 18 n.7; Pet. Br. 21 n.20). Such claims, predicated on the Sixth Amendment, are

normally exempt from any requirement that they be raised on direct appeal because they are fundamentally distinct from any other form of trial error.[1]

Ineffectiveness claims are treated differently because they almost always require factual development outside of the trial record. And, unlike evidentiary rulings or other judicial determinations, trial courts rarely issue opinions on counsel's performance that would aid the court of appeals in reviewing a Sixth Amendment claim.[2] Therefore, unless there has been a *hearing* before the trial court on counsel's ineffectiveness, there is frequently no decision on the issue and the matter is not truly preserved, in the conventional sense, for appellate review.[3]

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[1] Significantly, since *United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984), the Solicitor General consistently advocated that "a defendant can attack the actual performance of trial counsel *only* through a petition for post-conviction relief under 28 U.S.C. § 2255, and not through direct appeal" (emphasis supplied). *See Billy-Eko v. United States*, 509 U.S. 901 (1993); *Diaz-Albertini v. United States*, 498 U.S. 1061 (1991); *Chappell v. United States*, 494 U.S. 1075 (1990). The government's brief contains no explanation for this change of position.

[2] Trial courts are in the "best position to make findings related to both the quality of trial counsel's performance and the impact of any shortfalls in that representation." *United States v. Mala*, 7 F.3d 1058, 1063 (1st Cir. 1993), *cert. denied*, 511 U.S. 1086 (1994); *United States v. Galloway*, 56 F.3d 1239, 1240 (10th Cir. 1995) (*en banc*) (in a collateral proceeding "counsel accused of deficient performance can explain their reasoning and actions, and the district court can render its opinion on the merits of the claim"); *see also Commonwealth v. Grant*, No. 57 WAP 2001, 2002 WL 31898393, *7 (Pa. Dec. 31, 2002).

[3] The Supreme Court of Nevada employs a clear-cut approach whereby ineffective assistance of counsel claims can only be raised on direct appeal if there has already been an *evidentiary hearing*. *Feazell v. State*, 906 P.2d 727, 729 (Nev. 1995); *Gibbons v. State*, 634 P.2d 1214 (Nev. 1981).

Similarly, even if the *facts* that give rise to an ineffectiveness claim may appear on the record, the *reasons* for counsel's actions are hardly ever developed.[4] Thus, the court on direct appeal is forced to speculate as to the basis for counsel's conduct.[5]

Furthermore, this Court previously recognized that "[i]n general, no comparable, meaningful opportunity exists for the full and fair litigation of a habeas petitioner's ineffective-assistance claims at trial and on direct review." *Kimmelman v. Morrison*, 477 U.S. 365, 378 n.3 (1986). Therefore, merely because the issue may have been identified during the trial proceedings does not mean that it was fully and fairly *litigated*.

In sum, ineffective assistance of counsel claims are, in essence, *collateral* claims, separate from the underlying facts of a conviction, and are properly addressed in collateral proceedings. Thus, a defendant should never be barred from presenting a Sixth Amendment claim in a collateral proceeding merely because that issue was not raised on direct appeal.

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[4] *See Galloway*, 56 F.3d at 1240; *People v. Mendoza Tello*, 933 P.2d 1134, 1136 (Cal. 1997) (no procedural bar should apply because a court should not "brand a defense attorney incompetent unless it can be truly confident all the relevant facts have been developed"); *People v. Alvarado*, 683 N.Y.S.2d 501, 502 (N.Y. App. Div. 1st Dept. 1998) (ineffectiveness claim required a collateral proceeding "since this claim is based on facts *dehors* the record and counsel has had no opportunity to explain his strategy").

[5] The Solicitor General calls this Court's attention to the Seventh Circuit's questionable presumption on direct appeal that trial counsel acted for tactical reasons (United States Br. 31 n.15, citing *United States v. Trevino*, 60 F.3d 333, 338 (7th Cir. 1995), *cert. denied*, 516 U.S. 1061 (1996)). However, in the absence of a complete record the court of appeals should not presume that counsel acted for strategic reasons — this is especially true when the trial attorney's *omissions* are at issue.

B. The Considerable Experience of Most State Courts and Federal Circuit Courts Argues Against the Second Circuit's Procedural Default Rule

The vast weight of federal authority does not support the Second Circuit's rule. In fact, ten circuit courts of appeals do not bar ineffectiveness claims that are first brought in post-conviction proceedings. Nevertheless, the Solicitor General invites this Court to look at decisions from selected states to support its suggestion that "application of the procedural default rule to ineffective assistance claims is not unworkable and does not entail an unwarranted burden on judicial administration" (United States Br. 35). However, the highest courts of at least thirty-five states similarly do *not* preclude defendants from first raising ineffectiveness claims in post-conviction proceedings.[6] Thus, a study of the experiences of most other states leads to the opposite conclusion than that suggested by the Solicitor General.

Notably, many of the states with the largest populations, and, logically, criminal justice systems that produce the most ineffectiveness claims, subscribe to the collateral

[6] The Solicitor General's research reveals only two circuit courts and sixteen state supreme courts that apply a procedural default rule to ineffective assistance of counsel claims (United States Br. 19, 36 n.18). As discussed later in this brief, since the government filed its brief, the Supreme Court of Pennsylvania abandoned the procedural default rule. *Commonwealth v. Grant*, No. 57 WAP 2001, 2002 WL 31898393 (Pa. Dec. 31, 2002). And, it appears that the Seventh Circuit is developing serious misgivings about that rule. *See, e.g., United States v. Woolley*, 123 F.3d 627, 634 (7th Cir. 1997) (discouraging ineffectiveness claims on direct appeal because such claims can waste the court's judicial resources).

review rule.[7] For example, the Supreme Court of California holds that "the rules generally prohibiting raising an issue on habeas corpus that was, or could have been, raised on appeal would not bar an ineffective assistance claim on habeas corpus." *People v. Mendoza Tello*, 933 P.2d 1134, 1135 (Cal. 1997).[8]

And, significantly, states that had previously required ineffectiveness claims to be presented at the earliest possible moment, are now revisiting that issue and adopting the collateral review rule based on their experience. In *Commonwealth v. Grant*, No. 57 WAP 2001, 2002 WL 31898393, *8 (Pa. Dec. 31, 2002), the Supreme Court of Pennsylvania, in a radical reversal of position, adopted the rule that ineffectiveness claims should be brought in collateral proceedings and cannot be barred based upon a failure to raise the claim on direct appeal — even though the claim may have been eligible for direct appellate review.[9]

[7] The Supreme Courts of the most populous states (California, Texas, New York and Florida) have never endorsed a procedural default doctrine for ineffectiveness claims (United States Br. 36 n.18).

[8] California reported the largest number of arrests in 2000 and leads the nation in habeas corpus petitions filed in district courts pursuant to 28 U.S.C. § 2254. U.S. Department of Justice, Bureau of Justice Statistics Sourcebook of Criminal Justice Statistics Online, available at http://www.albany.edu/sourcebook/1995/pdf/t45.pdf; *Federal Habeas Corpus Review : Challenging State Court Criminal Convictions*, U.S. Department of Justice, Office of Justice Programs at 9 (Sept. 1995). And, ineffectiveness claims constituted 25% of all issues in habeas corpus petitions sampled as part of the National Center for State Courts' study in 1995. *Id.* at 14.

[9] The recent Pennsylvania Supreme Court decision calls into question any suggestion that state courts are finding procedural default in a "growing number of cases" (United States Br. 36 n.18, citing Anne M. Voigts, Note, *Narrowing the Eye of the Needle: Procedural Defaults,*

For more than twenty-five years the State of Pennsylvania labored under a strict rule of procedural forfeiture, similar to the Second Circuit's rule, which required defendants to raise trial counsel's ineffectiveness when new counsel was obtained or else those claims were deemed waived. 2002 WL 31898393, *8. However, the Pennsylvania Supreme Court finally recognized that deferring review of ineffectiveness claims until the collateral review stage of the proceedings "offers a petitioner the best avenue to effect his Sixth Amendment right to counsel." *Id.* That high court also concluded that the "administration of justice will be served" since the collateral review rule "provides a clearer and more concise standard for both courts and the parties to follow." 2002 WL 31898393, *9.[10]

Habeas Reform, and Claims of Ineffective Assistance of Counsel, 99 Colum. L. Rev. 1103, 1128 (1999)). The more recent experience of courts reveals a continued preference for the collateral review rule. *See, e.g., State v. Spreitz*, 39 P.3d 525, 526 (Ariz. 2002); *State v. Elison*, 21 P.3d 483, 488-89 (Idaho 2001); *State v. Fraser*, 608 N.W.2d 244, 250 (N.D. 2000); *Robinson v. State*, 16 S.W.3d 808, 809 (Tex. Crim. App. 2000); *Ware v. State*, 759 A.2d 764, 793 (Md. 2000), *cert. denied*, 531 U.S. 1115 (2001).

[10] At least nine states, including Arizona and Virginia, require ineffectiveness claims to be raised in a collateral proceeding, and will not even consider them on direct appeal. *State v. Spreitz*, 39 P.3d 525 (Ariz. 2002); *Roach v. Commonwealth*, 468 S.E.2d 98, 105 n.4 (Va. 1996), *cert. denied*, 519 U.S. 951 (1996); *see also Champion v. State*, 908 P.2d 454, 470 (Alaska Ct. App. 1995); *Jackson v. State*, 654 A.2d 829, 832 (Del. 1995); *Lawrence v. State*, 691 So.2d 1068, 1074 (Fla. 1997), *cert. denied*, 522 U.S. 880 (1997); *State v. Nichols*, 698 A.2d 521, 522 (Me. 1997); *State v. Hurt*, 931 S.W.2d 213, 214 (Mo. Ct. App. 1996); *State v. Malstrom*, 672 A.2d 448, 450 (R.I. 1996); *State v. Kornahrens*, 350 S.E.2d 180, 184 (S.C. 1986), *cert. denied*, 480 U.S. 940 (1987).

New Hampshire and New York are among the states that permit, but do not require, ineffectiveness claims to be raised on direct appeal. *See, e.g., Humphrey v. Cunningham*, 584 A.2d 763, 766 (N.H. 1990) (although ineffectiveness claim could have been raised on direct appeal, a defendant may raise the issue on collateral attack if he can

One of the justices stressed that the court's "substantial experiences with the deficiencies and unintended consequences" of the procedural bar rule required correction. 2002 WL 31898393, *16 n.1 (Castille, J., concurring and dissenting).

C. Defendants Will Be Prejudiced If Appellate Attorneys Are Compelled to Raise Ineffectiveness Claims on Direct Appeal

In our opening brief we demonstrated the hazards confronting appellate counsel when forced to decide whether an ineffectiveness claim should be asserted on direct appeal or risk procedural default (Pet. Br. 27). For example, a defendant's Sixth Amendment claim that appears in the record but is raised prematurely may be resolved forever without the benefits of an amplified record. However, the Solicitor General suggests that this dilemma "should not often arise in practice" (United States Br. 32). But this very dilemma was a source of major concern to the National Association of Criminal Defense Lawyers ("NACDL") and the National Association of Federal Defenders ("NAFD"), which are in a far

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establish a harmful constitutional error); *People v. Brown*, 382 N.E.2d 1149, 1149 (N.Y. 1978) ("in the typical case it would be better, and in some cases essential, that an appellate attack on the effectiveness of counsel be bottomed on an evidentiary exploration by collateral or post-conviction proceeding"); *Woods v. State*, 701 N.E.2d 1208, 1220 (Ind. 1998), *cert. denied*, 528 U.S. 861 (1999)(if not raised on direct appeal, a Sixth Amendment claim of ineffective assistance of trial counsel may be presented in post-conviction proceedings); *see also State v. Pugsley*, 911 P.2d 761 (Idaho 1995); *State v. Hernandez*, 686 So. 2d 92, 94 (La. Ct. App. 1996); *Hunt v. State*, 583 A.2d 218, 227 (Md. 1990), *cert. denied*, 502 U.S. 835 (1991); *State v. Sparano*, 592 A.2d 608, 613 (N.J. Super. Ct. App. Div. 1991); *State v. Bengson*, 541 N.W.2d 702, 703 (N.D. 1996); *State v. Pettypool*, 676 P.2d 368, 368-69 (Or. 1984); *State v. McGill*, 536 N.W.2d 89, 94 (S.D. 1995).

better position to judge these matters based upon the experience of more than 28,000 members.[11] In addition, jurists have acknowledged the problem as well.[12]

The Solicitor General also indicates that the standard for determining when a claim is sufficiently developed is "not *unduly* ambiguous or unworkable" (United States Br. 32) (emphasis supplied). This, of course, recognizes that there are *some* ambiguities concerning when an issue is fully developed on the record to qualify for appellate review.[13] The confusion caused by this approach is evidenced by the significant number of defendants who have been forced to seek refuge in this Court on this very issue.[14]

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[11] The NACDL has 10,000 members nationwide — joined by 80 state and local affiliate organizations that total 28,000 members (NACDL Br. 1). The NAFD's membership includes attorneys of Federal Defender offices (NACDL Br. 1). In 1998, members of a Federal Defender organization represented 30.1% of all defendants in felony cases terminated in district courts. Caroline Wolf Harlow, *Bureau of Justice Statistics Special Report : Defense Counsel in Criminal Cases*, Table 2 (Nov. 2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf.

[12] *See, e.g., Guinan v. United States*, 6 F.3d 468, 476 (7th Cir. 1993) (Easterbrook, J., concurring) ("the inevitable loss will prevent the accused from raising the same claim later, when factual development would permit accurate resolution").

[13] As noted in *Billy-Eko v. United States*, 8 F.3d 111, 115 (2d Cir. 1993), the Solicitor General previously agreed that "adopting this limitation on the general exception for ineffective assistance claims might confuse defendants and attorneys in the future."

[14] *See, e.g., Moghal v. United States*, No. 95-9027, 519 U.S. 835 (1996); *Velasquez v. United States*, No. 95-6925, 516 U.S. 1160 (1996); *Sprecher v. United States*, No. 95-82, 516 U.S. 913 (1995); *Diaz-Albertini v. United States*, No. 90-552, 498 U.S. 1061 (1991); *Chappell v. United States*, No. 89-1040, 494 U.S. 1075 (1990). This list is illustrative only and by no means exhaustive. There is no way to calculate how many other defendants' Sixth Amendment claims have been lost because of this procedural trap.

The Solicitor General suggests that with ineffective assistance claims the "analysis of prejudice merges with the prejudice prong of the underlying claim on the merits" (United States Br. 21-22, 31). However, even if the prejudice components are identical, which is disputed, the Second Circuit's approach produces an odd result because the court must "evaluat[e] the merits of the case to determine whether [it] should evaluate the merits. Nothing productive is accomplished." *United States v. Galloway*, 56 F.3d 1239, 1242 (10th Cir. 1995) (*en banc*). Therefore, pursuant to the Second Circuit rule, a petitioner cannot even obtain a hearing under § 2255 on an ineffectiveness claim without first proving the very prejudice that could only be developed through a hearing.[15]

Finally, the experience of various courts, including the Seventh Circuit, reveals that "a defendant who presents an ineffective-assistance claim for the first time on direct appeal has little to gain and everything to lose." *United States v. Trevino*, 60 F.3d 333, 338 (7th Cir. 1995).

D. Finality of Judgment Should Not Dictate a Default Rule Which Has Serious Practical Drawbacks and Undermines Sixth Amendment Values

Although the Solicitor General still concedes that our concerns over the procedural bar rule "have force" (United States Br. 10), and acknowledges that the "bright-line rule" previously advocated by the government would "have certain advantages" (United States Br. 15),

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[15] 28 U.S.C. § 2255 provides that "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon."

the government now suggests that "on balance" requiring ineffectiveness claims to be raised on direct appeal "serves the general societal interest in respecting the finality of criminal judgments and encouraging resolution of legal challenges to convictions at the earliest feasible opportunity" (United States Br. 10).[16] However, society's interest in the "finality" of criminal judgments should not override the majority approach which allows a defendant to obtain a hearing on a Sixth Amendment claim.

The Court of Appeals for the Tenth Circuit, sitting *en banc*, noted that concerns relating to finality and other considerations do not justify the burdens and hardships caused by application of the procedural bar doctrine to ineffectiveness claims. *Galloway*, 56 F.3d at 1241. This is because the doctrine will, inevitably, result in further claims that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on direct appeal. 56 F.3d at 1242. Finality is not, in

[16] *Bousley v. United States*, 523 U.S. 614 (1998), relied upon by the Solicitor General, involved a guilty plea, rather than a trial. Of course, "the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas." 523 U.S. at 621, quoting *United States v. Timmreck*, 441 U.S. 780, 784 (1979). This is, in part, because the impact of any "inroad on the concept of finality" is "greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea." *Timmreck*, 441 U.S. at 784.

practice, achieved through the Second Circuit's rule which also leads to piecemeal presentation of ineffectiveness claims.[17]

Judicial experience reveals that "the prejudicial effect of trial counsel's chosen course of action is determined more accurately after the trial and appellate courts have had the opportunity to review the alleged claims of error and if necessary, correct any trial court errors. It is after this review that the full effect of counsel's conduct can be placed in the context of the case." *Commonwealth v. Grant*, No. 57 WAP 2001, 2002 WL 31898393, *8 (Pa. Dec. 31, 2002).[18] As the Pennsylvania Supreme Court recently observed,

> we have learned that time is necessary for a petitioner to discover and fully develop claims related to trial counsel ineffectiveness. Deferring review of trial counsel ineffectiveness claims until the collateral

[17] *See, e.g., Riascos-Prado v. United States*, 66 F.3d 30, 35 (2d Cir. 1995) (the Second Circuit's rule sometimes necessitates bringing ineffectiveness claims on *both* direct appeal and § 2255 proceedings); *see also United States v. Woolley*, 123 F.3d 627, 634 (7th Cir. 1997) (ineffectiveness claims on direct appeal are discouraged, in part, because the bringing of such claims "can result in a waste of a court's judicial resources, as we often examine an appellant's ineffective assistance arguments, only to conclude that the record is insufficient for us to even rule on whether the record is sufficient to establish the appellant's claim").

[18] This, in fact, is precisely what happened in Petitioner's case. The prejudice of trial counsel's failures did not initially become evident until the Second Circuit issued its decision finding that "Massaro's rejection of a continuance supports our conclusion" that Massaro was not substantially prejudiced by the government's delay in advising the defense of the bullet and "Massaro's decision to proceed with his strategy despite his knowledge that the bullet might be matched to existing shell fragments weakens his claim" (Pet. App. 36-37).

review stage of the proceedings offers a petitioner the best avenue to effect his Sixth Amendment right to counsel. *Id.*

Furthermore, the Solicitor General cites to *United States v. Frady*, 456 U.S. 152, 166 (1982), and *Murray v. Carrier*, 477 U.S. 478, 491 (1986), to support its "finality of judgment" claim (United States Br. 14 n.5, 23). However, both of those cases were decided *before* the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which imposes a one-year limitation on motions made pursuant to 28 U.S.C. § 2255. This statute of limitations advances finality in criminal proceedings and restricts the filing of successive § 2255 motions (United States Br. 30 n.14).[19] Thus, recent statutory limitations eliminate the concern in *Frady* of a "series of endless postconviction collateral attacks." 456 U.S. at 164-65.

Lastly, as properly observed by *amici*, claims of "finality" should not detract from this Court's determination of what approach provides the most "regular, orderly method" of presenting and resolving ineffectiveness claims (NACDL Br. 15, citing *Sunal v. Large*, 332 U.S. 174, 181-82 (1947)). Rules of procedure "should be designed to induce litigants to present their contentions to the right tribunal at the right time. For ineffective assistance, the court of appeals on direct appeal is the wrong tribunal at the wrong time." *United States v. Woolley*,

[19] In *Duncan v. Walker*, 533 U.S. 167, 178-79 (2001), this Court reversed the Second Circuit and concluded that part of A.E.D.P.A.'s purpose was to further the principle of finality and to reduce the potential for delay on the road to finality.

123 F.3d 627, 634 (7th Cir. 1997), quoting *Guinan v. United States*, 6 F.3d 468, 476 (7th Cir. 1993) (Easterbrook, J., concurring).

The collateral review doctrine (1) presents a bright-line rule that provide attorneys and courts with certitude as to when specific claims must be raised; (2) allows for a complete development of the record relating to the facts and circumstances underlying the ineffectiveness claim; (3) provides trial lawyers with an opportunity to be heard before any determination is made as to whether or not they were ineffective; (4) ensures that the district court has an opportunity to pass on *all* ineffectiveness claims before their presentation to an appellate court; (5) avoids time-consuming litigation over procedural issues of "cause and prejudice"; and (6) enables defendants to better assess the consequences of counsel's conduct. Against this host of compelling considerations, the Solicitor General leans only the notion of finality.[20] However, concerns of finality must give way to the higher value, recognized by a majority of federal and state courts, of allowing a defendant to obtain a fair hearing on an ineffectiveness claim.

[20] The Solicitor General still recognizes that the accepted collateral review rule "is straightforward to administer, and avoids the expenditure of judicial resources on applying the cause-and-prejudice standard to ineffectiveness claims, with the goal of identifying that set of claims that could fairly be raised and resolved on direct appeal" (United States Br. 15).

II. THE COURT OF APPEALS ERRONEOUSLY DENIED PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

A. Cause Exists for Any Failure to Present Petitioner's Ineffectiveness Claim on Direct Appeal

As indicated above, the Second Circuit's procedural forfeiture rule should not be applied to bar the presentation of a Sixth Amendment claim in a collateral proceeding. However, even if that radical approach is applicable, Petitioner established cause for the failure to raise the ineffectiveness issue on direct appeal and prejudice resulting therefrom.

Petitioner's opening brief demonstrated that the *prejudice* from trial counsel's refusal to accept a continuance and to properly investigate the newly discovered bullet evidence did not become apparent until after Petitioner's direct appeal was concluded (Pet. Br. 32).[21] The decision of the Second Circuit, on direct appeal, alerted the defense to the damage caused by trial counsel's conduct (Pet. App. 36-37), and the subsequent investigation of three experts revealed serious questions relating to the bullet's connection to the Fiorito homicide (J.A. 150). This constituted "cause" for why the ineffectiveness claim was not raised on direct appeal.

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[21] To prevail on an ineffectiveness claim, the defendant must show that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The Solicitor General claims that the experts' affidavits "add nothing of significance to the trial record on whether counsel's failure to accept a continuance caused prejudice to Petitioner" (United States Br. 40). However, Petitioner's forensic experts concluded that the bullet's involvement in the murder must be viewed with "great suspicion" and "it is highly unlikely that the projectile recovered from the automobile is, in truth, connected with the shooting" (J.A. 149-50).[22] The experts also indicated that further investigation was required (J.A. 150, 151, 175). And, Petitioner showed that any failure on the part of the defense to have its experts examine the bullet was because of the extremely limited access provided by the government.[23]

The facts presented by these experts — which are outside of the record from the direct appeal — support a conclusion that, at the very least, a hearing is warranted into these substantial claims and that this issue is properly presented under the auspices of a § 2255 motion.

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[22] The government tries to impugn the importance of the bullet but it was *conceded* on appeal that the bullet was "the most important" evidence in the trial (J.A. 137). Its importance is magnified by the fact that the NYPD ballistics laboratory could not match the shell casing found in the car to the bullet (J.A. 42, 50).

[23] Contrary to the government's contention that Petitioner did not pursue further examination of the bullet evidence or seek a court order (United States Br. 41 n.20), the defense expressly sought an order which would allow Petitioner's experts to examine the bullet and fragments (A.C.A.77,80; J.A. 175). The district judge never granted that application and, instead, dismissed the § 2255 motion on procedural grounds without conducting a hearing (Pet. App. 16-26).

B. Prejudice Results From Any Failure to Present the Ineffectiveness Claim on Direct Appeal

The Solicitor General endeavors to merge the prejudice component of an ineffectiveness claim under *Strickland v. Washington*, 466 U.S. 668 (1984), with the prejudice required to excuse a procedural default under *United States v. Frady*, 456 U.S. 152 (1982). However, as discussed above, a defendant should not be forced to prove the merits of his case to obtain a hearing under 28 U.S.C. § 2255.

Regardless, the affidavits of Petitioner's experts reveal that there is more than a reasonable probability that the result at trial would have been different had trial counsel accepted the continuance and fulfilled his professional obligations to investigate the issues surrounding the sudden appearance of the wayward bullet (Pet. Br. 11-13). This is especially true in light of the peculiar facts of this case, which involve the mysterious discovery of a bullet, on the eve of trial, in a car that had been thoroughly searched several times by police officials (Pet. Br. 34-35). The evidence against Petitioner was *far* from overwhelming, the murder weapon was never recovered, and no fingerprints or bloody clothing ever linked Petitioner to the homicide.

A hearing is also required to investigate defense counsel's preoccupation with the financial costs that he would personally incur by prolonging the proceedings (J.A. 19, 25). Moreover, counsel conceded that he failed to investigate evidence relating to the discovery of the bullet because he was too busy (J.A. 66). These profound issues warrant further factual development and highlight the prejudice to Petitioner's constitutional rights.

Finally, the enduring prejudice in this case is that Petitioner is now suffering a life sentence but no court has ever reviewed the merits of his Sixth Amendment claim — even though the court of appeals concluded that counsel's failure to accept a continuance weakened Petitioner's claims (Pet. App. 37). Under these circumstances, the Second Circuit's procedural default rule was improperly applied.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the case remanded for a hearing on the merits of Petitioner's Sixth Amendment claim.

January 22, 2003

Respectfully submitted,

HERALD PRICE FAHRINGER*
ERICA T. DUBNO
LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY
& CAMBRIA LLP
780 Third Avenue, 32nd Floor
New York, NY 10017
(212) 319-5351

Counsel for Petitioner

* *Counsel of Record*

Of Counsel:
EUGENE GRESSMAN
Univ. of North Carolina
School of Law
Campus Box #3380
Chapel Hill, NC 27599
(919) 962-3688

(6)

Supreme Court, U.S.
FILED
NOV 14 2002
OFFICE OF THE CLERK

No. 01-1559

In the
Supreme Court of the United States

JOSEPH MASSARO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
to the Court of Appeals for the Second Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF PETITIONER

DAVID A. LEWIS
Counsel of Record
2108 Albemarle Terrace
New York, NY 10007
(718) 282-9686

DAVID M. PORTER
Co-chair, NACDL
Amicus Committee
801 K Street, 10th Floor
Sacramento, CA 95814
(916) 498-5700

Of Counsel

33 pp

QUESTION PRESENTED BY *AMICI CURIAE*

1. Whether a rule permitting any claim of ineffective assistance of counsel to be brought in a proceeding pursuant to 28 U.S.C. § 2255, with no procedural bar for claims that might have been brought on direct appeal, provides the most "orderly appellate procedure" for resolution of such claims.

TABLE OF CONTENTS

Page

QUESTION PRESENTED BY *AMICI CURIAE* i

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. A Rule Permitting Any Claim of Ineffective Assistance of Counsel To Be Brought in a Proceeding Pursuant to 28 U.S.C. § 2255, with No Procedural Bar for Claims That Might Have Been Brought on Direct Appeal, Provides the Most "Orderly Appellate Procedure" for Resolution of Such Claims.. 6

A. The Question Here, Concerning the Proper Procedure for Presentation of Claims of Ineffective Assistance of Counsel in the Federal Courts, Is One of "Orderly Appellate Procedure." 7

B. The Most Orderly and Efficient Procedure for Litigation of Claims of Ineffective Assistance of Counsel Is to Permit All Such Claims To Be Brought for the First Time on Motions Pursuant to 28 U.S.C. § 2255; There Is No Significant Interest Supporting the Alternate Rule Applied by the Second Circuit 15

CONCLUSION 26

TABLE OF AUTHORITIES

CASES Page

Adams v. United States ex rel. McMann, 317 U.S. 269 (1942) 2, 7, 8, 9, 11, 16, 25

In re Agrillo, 194 A.D.2d 16, 604 N.Y.S.2d 171 (App. Div. 1993) 18

Billy-Eko v, United States, 8 F.3d 111 (2d Cir. 1993) 6, 16, 20, 22, 24, 25

Bousley v. United States, 523 U.S. 614 (1998) 10

Bowen v. Johnston, 306 U.S. 19 (1939) 10

Davis v. United States, 411 U.S. 233 (1973) 3, 11, 12

In re Disciplinary Proceedings Against Dumke, 248 Wis. 2d 704, 635 N.W.2d 594 (2001) 18

Eubanks v. United States, 11 F. Supp. 2d 455, 464 (S.D.N.Y. 1998) 16

Florida Bar v. Sandstrom, 609 So. 2d 583 (Fla. 1992) 18

Glasgow v. Moyer, 225 U.S. 420 (1912) 8

In re Gregory, 219 U.S. 210 (1911) 8

Grice v. United States, 1998 WL 743718 (N.D.N.Y. Oct. 15, 1998) 21

Guinan v. United States, 6 F.3d 468 (7th Cir. 1993) 6, 16, 21, 23, 24, 25

Hill v. United States, 368 U.S. 424 (1962) 10

James v. United States, 2002 WL 1023146 (S.D.N.Y. May 20, 2002) 21

Jones v. United States, 2002 WL 188355 (S.D.N.Y. February 6, 2002) 24

Lamberti v. United States, 1998 WL 118172 (S.D.N.Y. March 13, 1998) 17

In re Lewis, 445 N.E.2d 987 (Ind. 1983) 18

Massaro v. United States, 27 Fed. Appx. 26, 30-31 (2d Cir. 2001) 20

McKee v. United States, 167 F.3d 103 (2d Cir. 1999) 17

Moskowitz v. United States, 2002 WL 31119269 (S.D.N.Y. Sept. 24, 2002) 21

Office of Disciplinary Counsel v. McKinney, 668 S.W.2d 293 (Tenn. 1984) 18

Peets v. United States, 55 F. Supp. 2d 275, 277 (S.D.N.Y. 1999) 21

Saldarriaga v. United States, 2002 WL 449651 (S.D.N.Y. March 21, 2002) 21, 22

Sparman v. Edwards, 154 F.3d 51 (2d Cir. 1998) 17-18

Sunal v. Large, 332 U.S. 174 (1947) 2, 7, 9, 10, 11, 15

Susana v. United States, 1994 WL 577722 (S.D.N.Y. Oct. 19, 1994) 21

United States v. Aroworade, 1999 WL 1206625 (N.D. Ill. Dec. 13, 1999) 16

United States v. Baviello, 1993 WL 120048 (S.D.N.Y. March 10, 1993) 24

United States v. Benchimol, 471 U.S. 453 (1985) 10

United States v. Cronic, 466 U.S. 648 (1984) 7

United States v. DeRewal, 10 F.3d 100 (3d Cir. 1993) 6

United States v. Diaz-Collado, 981 F.2d 640 (2d Cir. 1992) 24

United States v. Fares, 978 F.2d 52 (2d Cir. 1992) 24

United States v. Galloway, 56 F.3d 1239 (10th Cir. 1995) 3, 6, 11, 17, 18, 22, 24, 25, 26

United States v. Pichardo, 1992 WL 249964 (S.D.N.Y. September 22, 1992) 24

United States v. Quiroz, 2002 WL 31422892 (D. Kan. Oct. 24, 2002) 19

United States v. Taglia, 922 F.3d 413 (7th Cir. 1991) 25

United States v. Timmreck, 441 U.S. 780 (1979) 10

United States v. Workman, 80 F.3d 688 (2d Cir. 1996) 22

Wainwright v. Sykes, 433 U.S. 72 (1977) 3, 8, 11, 13, 14, 15, 16

Waley v. Johnston, 316 U.S. 101 (1942) 14

In re Wolfram, 174 Ariz. 49, 847 P.2d 94 (Ariz. 1993) 18

STATUTES AND RULES

28 U.S.C. § 2254 12

28 U.S.C. § 2255 ..... passim

Fed. R. Crim. Pro. 12(b)(2) 12

MISCELLANEOUS

1 James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 2.4d (4th ed. 2001) 8

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF RESPONDENT

INTERESTS OF AMICI CURIAE

The NACDL, a nonprofit corporation, is the only national bar association working in the interest of public and private criminal defense attorneys and their clients. NACDL was founded in 1958 to ensure justice and due process for persons accused of crimes; foster the integrity, independence and expertise of the criminal defense profession; and promote the proper and fair administration of justice.[1] NACDL has 10,000 members nationwide -- joined by 80 state and local affiliate organizations with 28,000 members -- including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The Association is a nationwide, non-profit, volunteer organization whose membership includes attorneys and support staff of Federal Defender offices. One of the NAFD's missions is to file amicus curiae briefs to ensure that the position of indigent defendants in the criminal justice system is adequately

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1. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than NACDL or NAFD, made any monetary contribution to its preparation or submission. *See* Rule 37.6, Sup. Ct. Rules. The parties have consented to the filing of this brief, and letters of consent have been lodged with the Clerk of the Court. Rule 37.3(a).

represented.

In this case, the NACDL and NAFD are specifically interested because the procedural default rule adopted by the Second Circuit places undue burdens on appellate counsel in criminal cases, creates procedural traps for defendants claiming ineffective assistance of counsel, and does not best serve the interests of counsel charged with ineffectiveness.

SUMMARY OF ARGUMENT

A. The Second Circuit held in this case that petitioner's claim of ineffective assistance of counsel could not be considered on his post-conviction motion under 28 U.S.C. § 2255, the analogue to habeas corpus review for federal prisoners, because petitioner had committed a procedural default for which he could not show an adequate excuse. The alleged default was the failure to present the claim in the first instance on direct appeal, an application of the principle that "habeas corpus will not do service for an appeal," *Sunal v. Large*, 332 U.S. 174, 178 (1947); *Adams v. United States ex rel. McMann*, 317 U.S. 269, 274 (1942). The question that the Circuit's holding poses for this Court is not whether the alleged default was excusable, but the more fundamental question whether there was any default, that is, any violation of a procedural rule, at all. Resolution of this question requires the Court to determine what the procedural rules are in the federal courts for the orderly presentation of ineffective assistance claims on direct appeal and habeas review.

Consideration of the origin and nature of the rule that habeas "will not do service" for an appeal shows that the rule is not absolute, but is a flexible, practical principle based in concerns of "orderly appellate procedure." *Adams*, 317 U.S. at 274; *see Sunal*, 332 U.S. at 180 (not "inflexible" rule). In applying the rule, it is important to note that it is not based on the same policies that underlie rules like "contemporaneous objection" rules at trial, which emphasize the importance of

presenting claims at the earliest practical time. *See Wainwright v. Sykes*, 433 U.S. 72 (1977); *Davis v. United States*, 411 U.S. 233 (1973). In the trial context, it is important to require counsel to raise issues promptly to permit potential errors to be cured at an early stage, *see Wainwright*, 433 U.S. at 88-90; *Davis*, 411 U.S. at 241, but such considerations are not applicable to appellate defaults.

The procedural rule here is thus not one which necessitates the raising of every claim at the earliest possible moment but one which should encourage claims to be raised in the way best suited to their orderly resolution.

B. The rule applied by the Second Circuit in this case violates important principles of appellate review, places serious practical burdens on participants in the appellate process, raises difficult additional questions for the courts to resolve, and promises no increased efficiency for the courts. Accordingly, *Amici* support adoption of the competing, bright-line rule that any ineffectiveness claim, whether based on the appellate record or not, may be brought for the first time in a proceeding pursuant to 28 U.S.C. § 2255, the proceeding best suited to its resolution. *United States v. Galloway*, 56 F.3d 1239, 1242 (10th Cir. 1995) (en banc).

The Second Circuit's rule contravenes the usual rule that claims should ordinarily be brought in the trial court in the first instance so that that court, which is most familiar with the proceedings, can make initial findings as a basis for appellate review and so that a full record can be made. Even where a claim is evident on the record, the trial court is in the best position to assess the quality of counsel's performance, and, perhaps even more significantly, to assess the prejudice of any errors that were made by counsel, and it can often make an expeditious factual resolution of the claim, where an appellate court could not.

In addition, *Amici* contend that the Second Circuit's rule

violates the principle that claims should ordinarily be adjudicated on a full record, which includes, in the ineffectiveness context, trial counsel's account of the basis for his actions. *Amici* are organizations whose trial-lawyer members may be subject to ineffectiveness complaints and have a substantial interest in their accurate resolution, since a finding of ineffectiveness may subject them to disciplinary sanctions and the loss of their livelihood. *Amici* contend, therefore, that the federal courts' procedural rules ought to encourage claims being brought in post-conviction proceedings where counsel's basis for acting, or failing to act, in the case can be put on the record, an opportunity that does not fully exist at trial, even if the issue is raised. Accordingly, even if the ineffectiveness claim appears to have been addressed on the record, a defendant should not be punished for bringing the claim in proceedings under § 2255, where counsel will have a full opportunity to respond without the constraints that exist in the midst of trial.

The Second Circuit's rule places serious practical burdens on the participants in the appellate process. Its contours continue, after a decade, to be unclear, and it presents traps for the unwary, and even the wary, litigant. In addition, because of the looming possibility of default, counsel are encouraged to raise claims in the court of appeals, even when they are not properly presented there. Counsel must go through the pointless exercise of raising these claims only to enable the court to engage in the pointless exercise of deciding not to decide them (or worse, to decide them on an inadequate record). The rule also burdens appellate counsel by diverting him from his main task, learning and presenting the trial record, to a secondary task, investigating trial counsel's conduct to determine if there is off-the-record evidence of ineffectiveness. This investigation may well result in depriving appellate counsel of the important cooperation of trial counsel, who may not welcome it. The better rule permits appellate counsel to concentrate on the quintessentially appellate claims in the record and to consider later questions of ineffective assistance.

Should this Court adopt the Second Circuit's rule, there would remain other complicated questions to be resolved. The exact scope of the rule, and the claims it permits to be brought under § 2255, needs clarification. There is a serious question how the rule should apply when the defendant has an ineffectiveness claim, or claims, based on multiple aspects of counsel's performance, some of which appear on the record and some of which do not. And other aspects of the rule, such as who will be treated as "new appellate counsel," obligated to raise the claim on direct appeal, are not easily settled.

In practice, the Second Circuit's rule produces no increase in efficiency. It simply substitutes a difficult default rule for a substantive rule in some cases and in others requires resolution of both questions, often doubling the courts' work.

Finally, there is a paucity of good, practical reasons for forcing appellate counsel to raise an ineffectiveness claim in the court of appeals in the first instance, if, in counsel's judgment, it should not be brought there. None of the usual concerns with belated presentation of issues arising at trial are applicable, and there are no serious adverse consequences from adopting a rule permitting all ineffectiveness claims to be brought in proceedings under 28 U.S.C. § 2255 in the first instance.

ARGUMENT

I.

A Rule Permitting Any Claim of Ineffective Assistance of Counsel to Be Brought in a Proceeding Pursuant to 28 U.S.C. § 2255, with No Procedural Bar for Claims That Might Have Been Brought on Direct Appeal, Provides the Most "Orderly Appellate Procedure" for Resolution of Such Claims.

The Court faces a choice in this case between two procedural rules for the presentation and review of claims of ineffective assistance in the federal courts. The first is the bright-line rule that *Amici* support, that the failure to present an ineffectiveness claim on direct appeal does not violate any procedural rule in the federal courts and does not amount to a procedural default. *See United States v. Galloway*, 56 F.3d 1239, 1240 (10th Cir. 1995)(en banc); *United States v. DeRewal*, 10 F.3d 100, 101 (3d Cir. 1993). The alternative rule applied by the Second Circuit provides that a defendant must present a claim of ineffectiveness on direct appeal if he is represented by "new appellate counsel" and if "the claim is based solely on the record developed at trial," or alternatively, no further development of the record is "necessary." *Billy-Eko v, United States*, 8 F.3d 111, 115 (2d Cir. 1993); *see Guinan v. United States*, 6 F.3d 468, 472 (7th Cir. 1993) (if defendant postpones raising issue, he must have "valid reason," such as that trial counsel was appellate counsel, "claim could not be developed without new facts," or it "reasonably appeared that new evidence might be necessary"). The choice between these rules is governed by criteria of orderly appellate procedure, and *Amici* submit that the former rule is far superior in this regard, while the latter rule violates basic principles of orderly review and presents numerous practical disadvantages.

A. The Question Here, Concerning the Proper Procedure for Presentation of Claims of Ineffective Assistance of Counsel in the Federal Courts, Is One of "Orderly Appellate Procedure."

The procedural rule at issue here is easy to state in general terms. It consists of the truism that "habeas corpus will not do service for an appeal," *Sunal v. Large*, 332 U.S. 174, 178 (1947); *Adams v. United States ex rel. McMann*, 317 U.S. 269, 274 (1942), and it is the application of that rule to ineffective assistance claims that is in question. It is, however, not at all certain that the rule has any application to the presentation of ineffectiveness claims. Previously, indeed, the Solicitor General of the United States has taken the position that a direct appeal was not the proper forum in which to present claims of ineffective assistance of counsel and that they could be raised "*only* through a petition for post-conviction relief under 28 U.S.C. § 2255 ... because ineffective assistance claims are generally not properly in the District Court nor preserved for review on appeal." *United States v. Cronic*, 466 U.S. 648, 666 n.42 (1984) (emphasis supplied). The Solicitor General subsequently noted that there was "much to be said for a clear and uniform rule in this area" and that it was "the preferable result from the perspective of the federal criminal justice system" that defendants not be required to raise ineffectiveness claims on direct appeal. *See* Brief for the United States in *Billy-Eko v. United States*, No. 92-7897 at 7, 8. In light of these considerations, the Solicitor General concluded the failure to raise such a claim on appeal was not a procedural default. *Id.* at 7.

It is important, therefore, in applying the general rule that habeas may not "do service" for an appeal to this case, to determine what the underpinnings of that rule are. If they are the considerations of uniformity and efficient judicial administration that the Solicitor General found persuasive, then there is no substantial reason for requiring ineffectiveness claims to be presented in the first instance on direct appeal. *See Adams v.*

United States ex rel. McMann, 317 U.S. at 274 (rule based considerations of "orderly appellate procedure"). On the other hand, if the rule is grounded in the same considerations that lie behind contemporaneous objections rules at trial, emphasizing the importance of raising issues at the earliest moment, then presentation on direct appeal might be required. *Cf. Wainwright v. Sykes*, 433 U.S. 72, 88-90 (1977) (setting forth reasons for requiring "contemporaneous" objections at trial). Because the Court's decisions show that the rule that habeas may not "do service" for an appeal is grounded in concerns of efficient and orderly appellate procedure, *see Adams*, 317 U.S. at 274, a bright-line rule of the type the that the Solicitor General has previously advanced, which addresses such considerations, is the proper rule.

The modern rule that habeas corpus should not "do service for an appeal" was first articulated by the Court in *Adams v. United States ex rel. McMann*, 317 U.S. at 274. The rule had no statutory basis, but was adapted from earlier cases resting on common-law doctrines of the courts' jurisdiction under writs of habeas corpus and writs of error. *See id.*, citing *Glasgow v. Moyer*, 225 U.S. 420, 428 (1912)("writ of habeas corpus cannot be made to perform the office of a writ of error"); *In re Gregory*, 219 U.S. 210, 214 (1911)("Upon habeas corpus, the court examines only the power and the authority of the court to act, not the correctness of its conclusions.") Under the view of the earlier cases, there was little, if any, overlap between the federal courts' jurisdiction by writ of habeas corpus and their jurisdiction by writ of error, and a court simply had no jurisdiction to consider on habeas most issues that could be raised in error. *See In re Gregory*, 219 U.S. at 213-14 (collecting authority).[2]

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2. It may be doubted that the historic scope of habeas review was as narrow as the Court's language at this period would lead one to believe, see 1 James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 2.4d (4th ed. 2001),

When the Court in *Adams v. United States ex rel. McMann*, 317 U.S. 269, first set forth the modern rule that habeas should not "do service" for an appeal, it grounded the rule not on this jurisdictional basis, but rather on the need for "orderly appellate procedure," a concept it applied in a practical manner. *Id.* at 274. In *Adams*, the government contended that the court of appeals did not have jurisdiction to grant the writ of habeas corpus while an appeal presenting the same issue was pending. *Id.* at 272-73. This Court rejected the contention, and in the course of doing so observed, "Of course, the writ of habeas corpus should not do service for an appeal." *Id.* at 274. This rule, it went on, "must be strictly observed if orderly appellate procedure is to be maintained." *Id.* "Mere convenience," the Court continued, would not justify "resort to the writ as a substitute for an appeal," but, on the other hand, "dry formalism" should not prevent its use in appropriate cases, even where an appeal was available. *Id.* In the circumstances, the Court held, resort to habeas corpus was proper because the prisoner, representing himself, seemed unable to prepare the necessary bill of exceptions on the appeal unless it was submitted on the single point which the Circuit had entertained in habeas, which would have required him to forfeit his remaining claims. *Id.* at 274-75. At its origin, then, the rule in question here was one fundamentally of assuring "orderly appellate procedure" as a practical matter, not as a matter of "dry formalism."

A few years later, in *Sunal v. Large*, 332 U.S. 174, the Court reiterated that in the federal courts "the general rule is that the writ of *habeas corpus* will not be allowed to do service for an appeal," but pointed out at some length that this was simply the "general" rule and was not applied inflexibly. *Id.* at 178.

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but it was against this conception of the relative roles of appeal and habeas that the rule of appellate procedure in question here arose.

The rule had been ignored, and the writ entertained "without consideration of the adequacy of relief by the appellate route," in a score or more of earlier cases involving varied issues *Id.* at 178-79 & nn. 6-8. On the other hand, the writ was not designed in general for review of ordinary "errors in trial procedure." *Id.* The rule that such issues could not be raised in habeas was "not one defining power but one which relates to the appropriate exercise of power;" it was not an "inflexible" rule. *Id.* at 180, quoting *Bowen v. Johnston*, 306 U.S. 19, 26 (1939). Since the case before it concerned an "error of law in excluding a defense" at trial, the Court held, the "regular, orderly method" for presenting the claim was by appeal and certiorari,[3] lest defendants repetitively raise claims, and criminal litigationn

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3. The Court has since directly applied the rule that habeas will not "do service" for an appeal in only one other federal case, a case that casts no light on the controversy here. In *Bousley v. United States*, 523 U.S. 614, 621 (1998), the Court held that a petitioner challenging the validity of his guilty plea had to do so first on direct appeal because "the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas." *Id.*, quoting *United States v. Timmreck*, 441 U.S. 780, 784 (1979). In two other cases, involving post-conviction attacks on guilty pleas or sentences, the Court has relied on the doctrine to support holdings that the errors alleged were not sufficiently grave to support relief under § 2255. *See Timmreck*, 441 U.S. at 784; *Hill v. United States*, 368 U.S. 424, 428-29 (1962). And in *United States v. Benchimol*, 471 U.S. 453 (1985)(*per curiam*), the Court reached the merits of a challenge under § 2255 to the validity of a guilty plea, although one Justice would have held simply that there was no reason to let the post-conviction motion do service for an appeal. *See*, 471 U.S. at 457 (Stevens, J., concurring). None of these cases addresses the kinds of considerations that are present with respect to a claim of ineffective assistance of counsel, discussed more fully below.

become "interminable." 332 U.S. at 181-82.[4]

The procedural rule in question here is, therefore, a rule to provide "orderly appellate procedure," *Adams*, 317 U.S. at 274, and the question before the Court is what is the most "regular, orderly method," *Sunal*, 332 U.S. at 181-82, for adjudication of claims of ineffective assistance of counsel in the federal courts. In answering this question, it is important to consider that significant policies requiring, in the context of trial procedure, that claims be raised at the earliest possible moment are not present here. Thus, a bright-line rule permitting ineffective assistance claims to be raised following direct appeal does not implicate the kinds of powerful considerations that this Court articulated in cases such as *Davis v. United States*, 411 U.S. 233 (1973), and *Wainwright v. Sykes*, 433 U.S. 72 (1977), concerning contemporaneous objection rules applicable at trial.[5]

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4. The concern about "interminable" litigation has been addressed by recent legislation. The circumstances under which a federal prisoner may now bring a second motion under 28 U.S.C. § 2255 are severely limited: the discovery of new evidence that proves that the verdict could no longer be sustained, or the adoption by this Court of a new rule of constitutional law applicable retroactively to the prisoner's case. 28 U.S.C. § 2255. The prisoner's ineffectiveness claim will, accordingly, have to be brought within a year of his conviction, along with any other claims he might have, and there are no practical concerns with excessive litigation even if the ineffectiveness claim is not brought on direct appeal. *Cf. United States v. Galloway*, 56 F.3d at 1243 ("doctrines of successiveness and abuse of the writ ... prevent further attempts to litigate ineffectiveness claims after the first petition").

5. Since this is a federal case, moreover, the considerations of federalism, comity and "independent and adequate state grounds" involved in challenges to state convictions under 28

Most of the Court's more recent procedural default jurisprudence has its origin in the enforcement of contemporaneous objection rules in criminal trials, rules designed to make parties raise objections at the earliest opportunity. The Court has examined the rationale for such rules and the reasons for according them deference, but those reasons have little relevance to the questions of appellate procedure raised here. In *Davis v. United States*, 411 U.S. 233, where the Court first adopted the requirement that "cause" be shown to excuse a procedural default, the Court considered a specific requirement of Rule 12(b)(2) of the Federal Rules of Criminal Procedure that challenges to the composition of the grand jury or to the indictment be raised "before trial" in the absence of "cause shown." *Id.* at 236. It was important to enforce such rules strictly, the Court said, because if the rule was followed, "inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses and the parties have gone to the burden and expense of a trial." *Id.* at 241. On the other hand, if the rule were not strictly enforced, the defense would have "little incentive" to comply with it, since raising the objection might simply result in a new, valid indictment, and strong tactical considerations might make counsel delay raising the claim to use later as a basis to upset a conviction. *Id.*

This rationale is extremely strong in its context, but is

U.S.C. § 2254 are not present. Here, the Court's duty is to determine what the procedural rules in the federal courts are, and whether there has been a violation of such a rule. In cases arising under § 2254, the federal courts must accept the rulings of state courts as to state procedures. Thus, in such cases, if a state court required ineffective assistance claims to be raised on direct appeal, this Court would in most circumstances be bound by the rule, unless cause and prejudice for violating the rule were shown. Here, however, in the first instance, the Court must decide what is the federal procedural rule, not whether to defer to the established rule of a state court.

relevant only to the trial situation and has no application to the questions of appellate procedure in this case. While the deliberate failure to raise an issue at trial prevents an error being corrected, and in effect inserts an error in the proceeding to be raised on appeal, the failure to raise a claim on appeal confers no such strategic advantage. Thus, the strongest reason for insisting on the earliest possible presentation of claims and imposing strict default rules is not relevant here.

The Court enumerated several other, similar grounds for strict enforcement of contemporaneous objection rules in *Wainwright v. Sykes*, 433 U.S. at 88-90, but to the extent those grounds apply here, they support the view that claims of ineffectiveness should first be presented in the district court. Among the "interests which [a contemporaneous objection rule] serves in its own right," the Court said, is that it "enables the judge who observed the demeanor of [the] witnesses to make the factual determinations necessary for properly deciding the federal constitutional question." *Id.* at 88. But forcing ineffective assistance claims to be asserted on direct appeal would contravene this interest by taking the question away from the very judge who observed counsel's performance first-hand and, instead, put the burden on appellate courts to make factual and legal findings in the first instance. This is directly contrary to most concepts of orderly procedure. *See id.*

The only other rationale the Court set forth in *Wainwright* that is partially relevant to appellate procedures is that requiring early presentation of claims "enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest, not years later in a federal habeas proceeding." *Id.* at 88. Permitting ineffective assistance claims to be raised in a motion under § 2255 does not seriously affect this interest. First, the only ineffectiveness claims that can ever be brought on direct appeal are those that are largely, or entirely, shown on the written record of the case and in which making the record and the "recollections of witnesses" are of diminished significance. The delay in

presenting such a claim is of far less consequence than the same delay in presenting claims depending on testimony extrinsic to the trial, which are permitted by their nature to be delayed until the § 2255 stage. *Waley v. Johnston*, 316 U.S. 101, 103 (1942). Ironically, therefore, the rule the Second Circuit applied in this case bars claims as to which delay poses the least serious problem, but permits bringing claims more likely to be affected by delay. From the standpoint of delay, there is no substantial reason to treat claims based largely on the trial record any differently from claims based on extrinsic evidence.

In addition, recent changes in the law have limited the degree to which "delay" is significant in motions under 28 U.S.C. § 2255. No longer can such a proceeding occur "years later," as the Court in *Wainwright* feared. 433 U.S. at 88. A defendant now generally has one year after his conviction becomes final in which to present his claims under § 2255. 28 U.S.C. § 2255 ("A 1-year period of limitation shall apply to a motion under this section.") Thus, a rule permitting ineffectiveness claims to be raised initially on habeas does not significantly implicate this concern.

The remaining rationales set forth in *Wainwright* have no application at all here. For the most part, these recapitulate the Court's reasoning in *Davis* that requiring contemporaneous objections permits potential errors to be cured at an early stage and eliminates the possibility that counsel will deliberately permit an error to occur in order to provide an appellate issue in the event of a conviction. *See Wainwright*, 433 U.S. at 88-90. As noted above, these concerns have no relevance in the present context. Nor, finally, does permitting the issue of ineffective assistance to be raised initially on habeas "detract from the perception of the trial of a criminal case ... as a decisive and portentous event," the final concern the Court voiced in the contemporaneous objection context. *Id.* at 90. The decision whether to permit the issue of ineffective assistance to be raised initially on habeas has no effect on the conduct of the trial and involves only considerations of judicial efficiency and orderly

appellate procedure.

In conclusion, while rules requiring procedural default are commonly said to further the desirable end of "finality," *see Wainwright*, 433 U.S. at 88, in this context, speaking of "finality" by itself simply begs the question for decision. The question in this case, after all, is to determine at what point a conviction should be deemed "final" with respect to a claim of ineffective assistance of counsel, based on considerations of orderly procedure. The Solicitor General previously concluded that convictions need not be deemed "final" with respect to any such claim, until after consideration of a motion pursuant to 28 U.S.C. § 2255. Invocation of the red herring "finality" should not distract the Court from the actual question here, determining what rule of procedure provides for the most "regular, orderly method" of presenting and resolving ineffectiveness claims. *Sunal v. Large*, 332 U.S. at 181-82.

B. The Most Orderly and Efficient Procedure for Litigation of Claims of Ineffective Assistance of Counsel Is to Permit All Such Claims To Be Brought for the First Time on Motions Pursuant to 28 U.S.C. § 2255; There Is No Significant Interest Supporting the Alternate Rule Applied by the Second Circuit.

Amici contend that, for many reasons, a rule permitting all ineffectiveness claims to be brought in the district court under § 2255 provides for the most orderly presentation of such claims. This procedure comports with the usual rule that appellate courts should review only claims already passed on by the trial court and also insures that review will occur upon a complete record including, in a matter of particular interest to *Amici*, evidence from counsel charged with ineffectiveness. In addition, in operation, the rule forcing some ineffectiveness claims to be raised on direct appeal has a number of undesirable consequences for the judicial process, including creating unfair traps for counsel and defendants, encouraging the presentation of appellate claims that either cannot be decided on direct appeal

or are better presented on motions in the district court, altering the usual function of appellate counsel, damaging the necessary cooperation between new appellate counsel and trial counsel, and unnecessarily complicating litigation. Against these compelling arguments, the argument that an ineffectiveness claim must be raised "at the earliest feasible opportunity," *Billy-Eko v. United States*, 8 F.3d at 115, amounts to the kind of "dry formalism" that this Court rejected early on, *Adams*, 317 U.S. at 274, and should continue to reject here.

Even those courts that require some ineffectiveness claims to be presented on direct appeal acknowledge that their rule "violates the principle that an issue not raised in the district court ... cannot be raised in the court of appeals." *Guinan*, 6 F.3d at 465. This Court has recognized the importance of this principle in the application of procedural default rules, and stated that such rules should encourage the presentation of claims in the first instance to the trial court familiar with the case, not to a reviewing court. *Wainwright v. Sykes*, 433 U.S. at 88. The principle is of considerable practical importance in the ineffective assistance context. The trial judge is in by far the best position to assess the effectiveness of counsel and to evaluate the reasons for counsel's actions. *See, e.g., Eubanks v. United States*, 11 F. Supp. 2d 455, 464 (S.D.N.Y. 1998) (district court rejects claim of inadequate cross-examination based on its own observations). Committing the ineffectiveness decision in the first instance to the trial judge often simplifies the entire question. In many cases, a simple factual finding makes it clear that counsel did not act unreasonably, essentially ending the litigation. In others, even where it appears that counsel acted unprofessionally, the judge who witnessed the proceedings can best address the claim that the defendant was prejudiced by counsel's conduct. Indeed, where the claim is that, had defense counsel acted properly, the court would have acted more favorably to the defendant, the court's own assessment of prejudice is definitive. *United States v. Aroworade*, 1999 WL 1206625 (N.D. Ill. Dec. 13, 1999) (failure to make motion for sentencing departure did not cause prejudice, since court would

have imposed same sentence in any event); *Lamberti v. United States*, 1998 WL 118172 at *3 (S.D.N.Y. March 13, 1998) (asserted ineffectiveness would have had no effect on sentence). Committing these issues to the court that tried the case in the first place invariably simplifies their resolution and simplifies appellate review, where it does not obviate that review altogether. Thus, "even if the record appears to need no further development, the claim should still be presented first to the district court in collateral proceedings ... so the reviewing court can have the benefit of the district court's views." *United States v. Galloway*, 56 F.3d at 1240.

The other prerequisite for orderly appellate review is an adequate record. Most ineffectiveness claims are based on alleged sins of omission, not sins of commission, and the record will not show counsel's reasons for failing to do something. Even where the claim is based on some apparently unjustifiable, and apparently prejudicial, act of counsel reflected in the record, the record will not show whether counsel was trying to avoid some even worse alternative, whether the client himself wanted the action taken, or whether there were other off-the-record justifications for counsel's action. Such factors should be considered, but are rarely evident on a trial record. Nor is it necessarily clear from the record itself whether there are additional factors, off the record, that are relevant to the claim. Ineffective assistance claims should thus be heard initially in proceedings in the district courts, since in that forum "at the very least counsel accused of deficient performance can explain their reasoning and actions." *Galloway*, 56 F.3d at 1240.[6]

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6. As a general matter, even the Second Circuit has agreed that counsel ought to be heard on these questions. *See McKee v. United States*, 167 F.3d 103, 108-09 (2d Cir. 1999) (finding counsel's failure to raise claim prejudicial, but remanding for counsel to be heard on question of effectiveness); *Sparman v. Edwards*, 154 F.3d 51, 51 (2d Cir. 1998) ("a district court facing the question of constitutional ineffectiveness of counsel

It is *Amici's* position, moreover, that defendants should not be punished for bringing ineffectiveness claims in § 2255 proceedings, since that is the place where the record can be made complete by giving trial counsel a full opportunity to be heard on the question of his competence. The courts seem not to have recognized that trial counsel have a substantial interest in such proceedings. A determination that a trial lawyer has been ineffective may entail serious consequences for that lawyer. Disciplinary proceedings are not infrequently commenced following such a finding. *See, e.g., In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (Ariz. 1993); *Florida Bar v. Sandstrom*, 609 So. 2d 583 (Fla. 1992); *In re Lewis*, 445 N.E.2d 987 (Ind. 1983); *In re Agrillo*, 194 A.D.2d 16, 604 N.Y.S.2d 171 (App. Div. 1993); *Office of Disciplinary Counsel v. McKinney*, 668 S.W.2d 293 (Tenn. 1984); *In re Disciplinary Proceedings Against Dumke*, 248 Wis. 2d 704, 635 N.W.2d 594 (2001). A lawyer found ineffective may lose eligibility for appointment as counsel in criminal cases. *See Rules of the United States District Courts for the Southern and Eastern Districts of New York, Appendix J: Plan for Furnishing Representation Pursuant to Criminal Justice Act of 1964*, ¶ III(F) (CJA Panel member may be removed "whenever the Board of Judges determines that the member has failed to fulfill the obligations of Panel membership or has engaged in other conduct which renders it inappropriate that he or she be continued as a Panel Member"). And the publication of such a finding may seriously affect the lawyer's livelihood, since members of the public may hesitate to seek the services of a lawyer labeled incompetent. Given these consequences, and the possibility that trial counsel may well have a justification not apparent on the record for his conduct, the applicable procedural rules should encourage ineffectiveness

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should, except in highly unusual circumstances, offer the assertedly ineffective attorney an opportunity to be heard and to present evidence, in the form of live testimony, affidavits, or briefs").

claims to be brought in proceedings where trial counsel has a full opportunity to be heard.

This is not solely for counsel's benefit, but also to permit the most thorough consideration of claims. It may well happen that what counsel says will clarify whether his performance has been adequate and even show a defendant's entitlement to relief, making proper resolution of the issue clear. *See, e.g., United States v. Quiroz*, 2002 WL 31422892 (D. Kan. Oct. 24, 2002) (where attorney sent letter to client incorrectly stating sentence client faced and testified that thereafter he never gave the correct information, ineffectiveness found).

The basis for defense counsel's actions can be determined most accurately, moreover, when he can give evidence in proceedings in which he no longer represents the defendant. When a client complains of counsel's performance during trial, counsel is placed in an extremely difficult position and does not have a full and adequate opportunity to explain his actions. The conflicting imperatives of getting on with the trial, trying to act in the client's best interests and not harm the case, and yet not being thought ineffective, may lead counsel to defend himself with less forcefulness than he could once representation has ceased and the trial is over. In general, therefore, even though counsel may have addressed some of the defendant's complaints on the record, the record may nonetheless not be complete concerning the basis for his actions or omissions. Those claiming ineffectiveness should not be deterred by default rules from bringing their claims in the forum where counsel may best explain his conduct.

Not only does the rule requiring ineffectiveness claims to be brought on direct appeal depart from the most orderly course of review, but it places inappropriate burdens on the appellate process as well. First, the rule makes it difficult for defense counsel to determine when to raise issues on appeal and creates traps for litigants. Second, because of this difficulty, and to avoid being faulted for a failure to raise a claim, counsel often

present claims on direct appeal that should not be presented there. And third, the rule interferes with the work of newly assigned or retained appellate counsel in completing his primary task, reviewing the trial record and preparing arguments based on it.

The first problem with application of the Second Circuit's default rule is that it has been difficult to apply and has borne out the Solicitor General's argument for a "clear and uniform rule in this area, so that appellate counsel, ... will not have to speculate about whether an ineffective assistance claim is properly presented on direct appeal." Brief for the United States in *Billy-Eko v. United States*, No. 92-7897 at 7-8. The rule, requiring claims that are "based solely on the record developed at trial" or in which additional evidence is not "necessary" to be brought on direct appeal, *Billy-Eko v. United States*, 8 F.3d at 115, has turned out not to be predictable in its application. In this very case, for example, the claim that defense counsel refused to let petitioner testify was held to be defaulted, *Massaro v. United States*, 27 Fed. Appx. 26, 30-31 (2d Cir. 2001), even though most counsel would assume that such a claim could hardly be made out without resort to off-the-record evidence showing what counsel said and why it kept petitioner from testifying, and thus that it would have to be presented in a motion under § 2255. The depth of the possible confusion is underlined by the fact that the government itself argued below that the claim was not defaulted, *id.* ("government agrees with Massaro" that claim not procedurally barred), demonstrating that the default rule is unclear and places an unacceptable burden on new appellate counsel.

The enforcement of the rule in the Second Circuit is rife with such contradictions, and they put appellate counsel in the difficult situation facing a choice of default on one hand or possible affirmance on an inadequate record on the other. *See United States v. Guinan*, 6 F.3d at 472 (default rule "hands appellate counsel a nasty dilemma"). It seems obvious, for example, that the claim that counsel was ineffective in failing to

call specific witnesses to the stand could not properly be decided on direct appeal, since what such witnesses would say, and what effect their testimony might have is nowhere on the record. *See, e.g., Susana v. United States*, 1994 WL 577722, at *2 (S.D.N.Y. Oct. 19, 1994) (such claim not barred because "who the witnesses were, what the substance of their testimony at trial would have been, and how that testimony would have shaped the outcome of the case" not on record). But in numerous cases, the courts of the Second Circuit have found just this kind of claim to be procedurally barred because it was not presented on direct appeal. *See, e.g., Moskowitz v. United States*, 2002 WL 31119269 (S.D.N.Y. Sept. 24, 2002); *James v. United States*, 2002 WL 1023146, at *6 (S.D.N.Y. May 20, 2002); *Peets v. United States*, 55 F. Supp. 2d 275, 277 (S.D.N.Y. 1999); *Grice v. United States*, 1998 WL 743718, at *2 (N.D.N.Y. Oct. 15, 1998).

That this poses a trap for the unwary, and, indeed, for the wary as well, is demonstrated by *Saldarriaga v. United States*, 2002 WL 449651 (S.D.N.Y. March 21, 2002). Saldarriaga claimed in his § 2255 motion that his counsel had been ineffective in not calling a witness at trial and in not submitting into evidence an affidavit from this witness attesting to his innocence. *Id.* at *2. Saldarriaga had repeatedly asked his appellate counsel to present this issue on appeal, and counsel, in five separate letters, had quite reasonably assured him that "the record does not support such a claim" and that "[a] claim of ineffective assistance of counsel is particularly appropriate in a 2255 motion where you can expand the record." *Id.* at *3. The district court held, nonetheless, that the claim was barred since it could have been presented on direct appeal, and it went on to chide appellate counsel for giving his client "misleading legal advice," while finding concurrently that such advice did not present "cause" for the failure to appeal. *Id.*[7]

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7. As an empirical matter, therefore, the Second Circuit's optimism that deciding whether to raise issues on appeal would

Second, beyond this inherent unfairness, the "uncertain lines" of the rule, Brief for the United States in *Billy-Eko*, at 7-8, have a second set of deleterious results for the federal criminal justice system. Given the rule's uncertainty, appellate counsel will, to avoid criticism or even a disciplinary charge, raise claims on direct appeal that ought properly to be brought in a motion under § 2255. As the Tenth Circuit observed in abandoning its former default rule: "The threat of default and resulting procedural bar has doubtless resulted in many claims being asserted on direct appeal only to protect the record." *Galloway*, 56 F.3d at 1241. The Second Circuit has acknowledged that its rule produces just this effect. *United States v. Workman*, 80 F.3d 688, 701 (2d Cir. 1996) (appellant's "decision to raise this claim on direct appeal ... is apparently driven by" the default rule in *Billy-Eko*). Indeed, the Second Circuit explicitly encourages new appellate counsel to submit claims in the court of appeals that counsel believe do not belong there. *See Billy-Eko*, 8 F.3d at 116 ("Even if new appellate counsel determines there is need for further extrinsic evidence, counsel would still be well-advised to err on the side of inclusion on direct appeal."). Raising these claims prematurely "unnecessarily burdens both the parties and the court." *Galloway*, 56 F.3d at 1241. Raising claims unnecessarily in the court of appeals may, in addition, constitute a "grave disservice" to the defendant if the court of appeals decides to reach the question, "because the inevitable loss will prevent the accused from raising the same claim later, when factual development would permit accurate resolution." *Guinan v. United States*, 6 F.3d at 476 (Easterbrook, J., concurring). A rule that encourages counsel to raise claims the court cannot decide, at some risk to his client, is at best a pointless waste of counsel's and the court's time and at worst an unfair trap for

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not be "a difficult burden to bear," and that appellate counsel would not have to be "soothsayers" to do it, has turned out to be entirely unwarranted. *Billy-Eko*, 8 F.3d at 115.

litigants. The true test of a rule of procedure is whether it "induce[s] litigants to present their contentions to the right tribunal at the right time." *Guinan*, 6 F.3d at 474 (Easterbrook, J., concurring). The Second Circuit's rule in this case fails this test miserably.

The rule has a third set of unfortunate consequences for appellate procedure that are evident to the defense bar, but have not been noted by the courts. First, it interferes with the work of new appellate counsel appointed to a case. The primary task of a lawyer newly appointed to an appeal is to learn a record with which he is not familiar and to do so expeditiously given deadlines for preparing an appendix and filing the brief. Under the Second Circuit's rule, counsel may have to spend time that should be devoted to the actual record in investigating whether there is off-the-record evidence of a claim of ineffectiveness or whether the claim must be presented on the direct appeal. In addition, that very investigation may deprive counsel of an important resource in preparing the appeal, the full cooperation of trial counsel. Trial counsel's information is often essential to the appeal, since there are commonly aspects of the case not readily apparent in the transcript that can help determine whether a potential appellate issue has good prospects or is fatally flawed. Once trial counsel learns of the potential of an ineffectiveness claim, however, he is apt to be far less forthcoming than otherwise. This may adversely affect counsel's choice or presentation of issues on the appeal, a result that serves neither the defendant nor the court well. It is *Amici's* view that it is a far better system to let appellate counsel deal with the quintessentially appellate issues on the record and to remit issues of ineffectiveness for presentation in the trial court under § 2255.

Adoption of a default rule does not, moreover, even have the virtue of simplifying litigation. As a preliminary matter, if this Court adopts such a rule, further, difficult questions will have to be answered. Those questions include: (1) whether the existence of *any* relevant extrinsic evidence avoids default, or

only material or "necessary" evidence, as the Second Circuit seems to hold, *Billy-Eko*, 8 F.3d at 115, or simply new appellate counsel's belief that such evidence exists, *see Guinan*, 6 F.3d at 472 ("reasonably appeared that new evidence might be necessary"); (2) whether if there are multiple allegations of ineffectiveness, some of which appear on the record, all claims may be brought pursuant to § 2255, the claims must be severed, or all must be brought on direct appeal, *see Galloway*, 56 F.3d at 1240-41; *Guinan*, 6 F.3d at 473; and (3) who qualifies as "new appellate counsel" -- a different appellate lawyer in the same law firm or Federal Defender's Office, a lawyer who like the trial lawyer, works in the Office of a Federal Defender, but in a different district, an appellate lawyer in private practice who shares space with the trial lawyer, a lawyer who works together with the trial lawyer regularly as appellate counsel, or only a completely independent lawyer? *See Jones v. United States*, 2002 WL 188355 at *6 (S.D.N.Y. February 6, 2002) (holding that lawyer was "new appellate counsel" even if trial and appellate counsel worked together and trial counsel assisted appellate counsel to "some degree" in preparing the appeal).[8] Permitting all ineffectiveness claims to be brought in § 2255 proceedings avoids these legal thickets.

Adopting this bright-line rule simplifies litigation in

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8. In fact, both lawyers in question in *Jones* were, at the time of Jones's November, 1992, trial, fellow employees of the Federal Defender Services Unit of The Legal Aid Society of New York City. *See*, dates and appearances of counsel in *United States v. Diaz-Collado*, 981 F.2d 640, 641 (2d Cir. 1992); *United States v. Fares*, 978 F.2d 52, 54 (2d Cir. 1992); *United States v. Pichardo*, 1992 WL 249964 (S.D.N.Y. September 22, 1992); *United States v. Baviello*, 1993 WL 120048 (S.D.N.Y. March 10, 1993). To require one lawyer in a Federal Defender's Office to argue that his colleague rendered ineffective assistance, as *Jones* appears to, would be intolerable.

other ways, for, as the Tenth Circuit has recognized, a default rule increases rather than decreases litigation. *Galloway*, 56 F.3d at 1242 (question of procedural bar "embroils us in nonmerits issues which are as time-consuming as if we went straight to the merits, and infinitely less productive"); *see Guinan*, 6 F.3d at 474 (Easterbrook, J., concurring) ("Far from simplifying and expediting the process of resolving ineffective-assistance claims, the [default rule] complicates and extends it.") The bright-line rule presents courts with a single issue for decision, the question of ineffectiveness. The default rule substitutes an equally difficult procedural issue for the ineffectiveness issue in some cases, but in many cases requires the court to decide *both* issues. As the Tenth Circuit held, "[t]he simple, most direct approach best serves the judicial process," *Galloway*, 56 F.3d at 1242, and this Court should adopt it.

Finally, the interests that support a default rule are comparatively meager. They consist largely of the bare notion that "defendants should raise their claims of ineffective assistance at the earliest feasible opportunity," *Billy-Eko*, 8 F.3d at 115, or that their "delay should not be countenanced." *United States v. Taglia*, 922 F.3d 413, 418 (7th Cir. 1991). At best, these rationales are the kind of "dry formalism" that the rule here is supposed to avoid, *Adams v. United States ex rel. McMann*, 317 U.S. at 274, for they are not supported by any significant practical considerations. At worst, they are a mistaken imposition on the appellate process of policies that are appropriate primarily to trial proceedings. *See* pp. 11-15, *supra*. In any event, forcing claims to be brought too soon and in the wrong forum does no service to the judicial process, *Guinan*, 6 F.3d at 474 (Easterbrook, J., concurring). Accordingly, *Amici* contend that the Court should adopt the simple, bright-line rule of the Tenth Circuit in *United States v. Galloway*, 56 F.3d at 1242, that "claims of constitutionally ineffective counsel should be brought on collateral review, in the first petition filed under 28 U.S.C. § 2255," and that "[n]o procedural bar will apply to claims which could have been brought on direct appeal but were brought in post-conviction

proceedings instead." *Id.*

CONCLUSION

The judgment of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

DAVID A. LEWIS
Counsel of Record